Chapter 3 Compensation

Authority for rules promulgated in this chapter is found in §§24-50-104 (1)(a), (b), (c), (e), (f), (4), (5), (6), (9), and 24-50-104.5(1), 109.5, 136, 137, and 208, C.R.S. Board rules are identified by cites beginning with "Board Rule".

General Principles

- 3-1. The Department of Personnel shall establish rules governing compensation for the state personnel system. Compensation practices shall provide for equitable treatment of similarly situated employees.
- 3-2. Pay grades shall reflect prevailing labor market compensation and any other pertinent considerations. No individual employee's base pay shall be less than the minimum of the grade or exceed a statutory lid. In the case of disciplinary action, base pay may be less than the minimum of the grade for a period not to exceed 12 months, subject to FLSA requirements.

Annual Compensation Survey

- 3-3. The Department of Personnel shall conduct the annual compensation survey. The Director shall establish and publish the distribution of annual compensation changes among salaries, including establishment of statewide priority groups and group benefit contributions, which shall be effective as provided by law. (9/1/12)
- 3-4. When upward pay grade changes are implemented, the grade minimum and maximum shall be adjusted and no employee shall be paid outside of the new grade, except in disciplinary actions resulting in salary temporarily below the new minimum and continuation of saved pay above the new maximum. (7/1/07)
- 3-5. If pay grade changes are downward, employees' base pay shall remain unchanged, subject to the statutory three-year limitation on saved pay.

Compensation Rates

- 3-6. The Department of Personnel shall publish the annual compensation plan. Departments shall use an hourly rate based on an annual salary to compensate employees who do not work a predetermined or full schedule.
- 3-7. Saved pay applies to downward movements due to individual allocation, system maintenance studies, and the annual compensation survey to maintain an employee's current base pay when it falls above the new grade maximum. It may also apply when retention rights are exercised pursuant to the "Separation" chapter. Base pay shall be moved to the maximum at the first available opportunity that does not cause a loss in the employee's pay. However, in no case will the employee's base pay remain above the grade maximum after three years from the action, even if it results in a loss in pay. (2/1/07)
- 3-8. Unless authorized by the Director, the rate resulting from multiple actions effective on the same date shall be computed in the following order. The Director may withhold salary adjustments for any employee with a final overall rating of needs improvement, except as provided in 3-4. (7/1/07)
 - 1. System maintenance studies.
 - 2. Upward, downward, or lateral movements.
 - 3. Repealed. (8/1/08)
 - 4. Changes in pay grade minimums and maximums to implement approved annual compensation changes to the pay structure.

- 5. Adjustments to the base pay of employees due to merit pay in approved annual compensation changes, subject to the new grade maximum and 3-19(C)(1)(a), (9/1/12)
- 6. Bring salaries to the new grade minimum as a result of compensation survey pay grade changes, except in disciplinary actions.
- 7. Non-base merit payments (based on new annual salary). (9/1/12)
- 3-9. The appointing authority shall determine the hiring salary within the pay grade for a new employee, including one returning after resignation, which is typically the grade minimum unless recruitment difficulty or other unusual conditions exist. (7/1/06)
 - A. Recruitment difficulty means difficulty in obtaining qualified applicants or an inadequate number of candidates to promote competition despite recruitment efforts.
 - B. Unusual conditions exist when the position requires experience and competencies beyond the entry level and the best candidate cannot be obtained by hiring at the minimum of the pay grade.
 - C. The appointing authority's determination shall consider such factors as, but not limited to, labor market supply, recruitment efforts, nature of the assignment and required competencies, qualifications and salary requirements of the best candidate, salaries of current and recently hired employees in similar positions in the department, available funds and the long-term impact on personal services budgets of hiring above the minimum of the pay grade.
- 3-10. In the case of fiscal emergency or other budget reasons, an employee may agree to voluntarily reduce current base pay, which shall be approved in writing by the appointing authority and employee. If funds become available at a later date, the department may restore base pay to any rate up to, and including, the former base pay. This policy shall not be used to substitute for other provisions in this chapter.
- 3-11. When an unclassified position is brought into the state personnel system and the unclassified person is selected to fill the position, the base pay shall be computed in accordance with the Department of Personnel's directives that shall ensure that total compensation is preserved to the greatest extent possible, except that base pay shall not exceed the grade maximum.

Downward Adjustments

- 3-12. Downward movement is a change to a different class with a lower range maximum (e.g., non-disciplinary or disciplinary demotions, individual allocations, system maintenance studies including class placement, or the annual compensation survey).
- 3-13. In the case of system maintenance studies and individual allocations of positions, the employee's base pay shall remain the same, including saved pay.
 - A. A department head has sole discretion to grant saved pay when employees exercise retention rights and the decision must be applied consistently throughout the retention area. If saved pay is granted, the employee's name shall not be placed on a reemployment list. (7/1/07)
- 3-14. In the case of other downward movements, the base pay shall not exceed the employee's current rate and shall not be above the maximum in the new grade.
 - A. Upon reversion of a trial service employee to the previously certified class, base pay shall be the amount the employee would be making had the promotion or reinstatement not occurred.

Upward Adjustments

- 3-15. Upward movement is a change to a different class with a higher range maximum (e.g., promotions, individual allocations, system maintenance studies including class placement, or the annual compensation survey).
- 3-16. In the case of system maintenance studies, employees' base pay shall remain the same. If the Director finds that severe and immediate recruitment and retention problems make it imperative to increase pay to maintain critical services, the Director may order that base pay be increased up to the percentage increase for the new class.
- 3-17. In the case of other upward movements, the employee's base pay may increase or remain the same, in which case the employee would receive the economic opportunity by moving to the new grade. In no case shall the new base rate be lower than the minimum, except in disciplinary actions, or higher than the maximum of the new grade. Continuation of a salary increase is subject to satisfactory completion of the trial service period.
 - A. When conditional employees move upward, the base pay shall be computed based on the certified class.

Lateral Adjustments

3-18. Lateral movement is a change to a different class or position with the same range maximum (e.g., transfers, individual allocations, system maintenance studies including class placement), or an inrange salary movement in the same class and position. Base pay shall be any rate between the employee's current rate and the grade maximum. In addition, in-range salary movements are subject to the provisions below. (8/1/08)

In-Range Salary Movements. A department may use these discretionary movements to increase base salaries of permanent employees who remain in their current classes and positions when there is a critical need not addressed by any other pay mechanism. The use of in-range salary movements is not guaranteed and shall be funded within existing budgets. These movements shall not be retroactive and frequency is limited to one in-range salary movement in a 12-month period. No aspect of granting these movements is subject to grievance or appeal, except for alleged discrimination; however, an alleged violation of the department's plan can be disputed. A department's decision in the dispute is final and no further recourse is available. Once granted, a reduction in base salary is subject to appeal. Departments must develop a written plan addressing appropriate criteria for the use of any movement based on sound business practice and needs, e.g., eligibility, funding sources, approval requirements, measures to ensure consistent use. The plan must be communicated within the department and a copy provided to the Director prior to implementation. If granted, there must be an individual written agreement between the employee and the appointing authority that stipulates the terms and conditions of the movement. Records of any aspect of these movements shall be provided to the Director when requested.

A. Salary Range Compression. Used as a salary leveling increase where longer-term or more experienced employees are paid lower in the range for the class than new hires or less experienced employees over a period of time resulting in documented retention difficulties. Thus, there is a valid need to increase one or more employee's base salary in the class to recognize contributions equal to or greater than the newly hired or less experienced employees. Justification shall be required based on facts. To be eligible, an employee must be performing satisfactorily as evidenced by the most recent final overall performance rating. The increase may be up to 10 percent or the maximum permitted by the department's policy on hiring salaries, whichever is greater, and subject to the pay grade maximum. (9/1/12)

- B. Counteroffer. Used when an employee with critical, strategic skills receives a higher salary offer from another department or outside employer and the appointing authority needs to increase the employee's base salary for retention purposes. To be eligible, an employee must be performing satisfactorily as evidenced by the most recent final overall performance rating. Written confirmation of the other entity's salary offer is required. The increase may be up to 10 percent or the maximum permitted by the department's policy on promotional pay, whichever is greater, and subject to the pay grade maximum.
- C. Delayed Promotional Increase. Used when a promotion is made with no salary increase or partial salary increase because production expectations are unproven and/or funds may be unavailable at the time of promotion. This is a one-time base salary increase within 12 months of the date of promotion when funds become available and the employee's contributions are fulfilled. The intent to provide a later salary increase must be documented at the time of the promotion. To be eligible, an employee must be performing satisfactorily as evidenced by the most recent final overall performance rating. The increase may be up to 10 percent or the maximum amount permitted in the department's policy on promotional pay increases, whichever is greater, and subject to the pay grade maximum. Transfer, promotion, demotion, or separation of the employee will negate the delayed increase.
- D. New Hires. Used at the time an employee is hired when production expectations for critical skills are unproven and/or funds may be unavailable. This is a one-time base salary increase within 12 months of hire. The intent to provide a later salary increase must be documented at the time of hire. To be eligible, early satisfactory completion of specified training objectives must be documented. This is limited to a one-time increase up to 10 percent or the maximum permitted by the department's policy on promotional pay increases, whichever is greater, and subject to the pay grade maximum. Transfer, promotion, demotion, or separation of the employee will negate the delayed increase.

Merit Pay (9/1/12)

- 3-19. Merit pay consists of both base and non-base building adjustments. Any permanent employee is eligible for merit pay, except as provided below and as otherwise provided in this chapter. Prior to the payment of merit pay, the Director shall specify and publish the percentage for any merit pay increase for applicable priority groups. Payments are effective on July 1. The employee must be employed on July 1 to receive payment. The employee's current department as of July 1 is responsible for payment, unless arrangements are made whereas the transferring department will provide full payment of a portion of any non-base building merit pay increase. (9/1/12)
 - A. If the final overall rating is needs improvement, the employee is ineligible for any merit pay. Merit pay shall not be denied because of a corrective or disciplinary action issued for an incident after the close of the previous performance cycle. (9/1/12)
 - B. For employees hired into the state personnel system during the performance evaluation cycle a prorated portion of any non-base building merit pay shall be provided. The proration shall be based on the number of calendar months worked. (9/1/12)
 - C. Base building Merit Pay (9/1/12)

Base building merit pay shall be a base building increase based on final performance evaluation and salary position within the pay range on June 1. (9/1/12)

- 1. Payment of base building merit pay shall not cause an employee's base pay to exceed the grade maximum, and is paid as regular salary. (9/1/12)
 - a. If the final overall rating is exceptional, the payment of any remaining portion of base building merit pay that would cause base pay to exceed grade maximum shall be paid as a one-time, non-base building lump sum in the July payroll. The statutory salary lid does not apply to such a payment. O. (9/1/12)
 - b. If the final overall rating is other than exceptional, but not needs improvement, any remaining portion of the payment that would cause base pay to exceed the grade maximum shall not be paid. If the base pay is at the grade maximum or in saved pay above the maximum, the employee is ineligible for base building merit pay. (9/1/12)
- 2. Payment of base building market pay shall be a comparison of state personnel system salaries to market salaries for the purpose of measuring competitiveness. Market shall result in base building increases to pay, only when an employee's salary is below a newly adjusted pay range minimum. (9/1/12)
- D. Non-base building merit pay (9/1/12)

Non-base building merit pay shall be a non-base building or one-time lump sum payment and shall be calculated after any annual compensation adjustments, including base building merit pay. (9/1/12)

- 1. Non-base building merit pay must be earned each year and shall be paid as a one-time lump sum in the July payroll. The grade maximum and statutory lid do not apply to non-base building merit pay. (9/1/12)
 - a. An employee must be employed on the date of the payment in order to be eligible to receive a non-base building merit payment. (9/1/12)

E. Merit pay from reversion (9/1/12)

Base building or non-base building merit pay may be provided to employees, at a department's discretion, when funded from a department's state employee reserve fund using department reversions. These discretionary merit payments shall only be paid to certified employees, in order of priority grouping established by the director. (9/1/12)

- 1. Base building merit pay increases funded from a department's state employee reserve fund shall be provided only if the department can justify sustainability as determined by the Governor's Office of State Planning and Budgeting. (9/1/12)
- 2. Merit pay increases funded from a department's state employee reserve fund shall not be provided more than once in a 12-month period per employee. 9/1/12)
- 3. Base building merit pay increases funded from the department's state employee reserve fund shall not cause an employee's base pay to exceed the mid-point of the employee's pay range. (9/1/12)

F. Any department providing recommendations regarding the amount that should be appropriated for merit pay must send such recommendation to the director by June 1, unless otherwise approved by the director. (9/1/12)

Incentives

- 3-20. Departments are strongly encouraged to use incentives. (9/1/12)
- 3-21. An appointing authority may grant an immediate non-base cash or non-cash incentive award to an employee in recognition of special accomplishments or contributions throughout the year or to augment merit pay, e.g., on-the-spot cash awards, work-life options, or administrative leave, in accordance with a department's established incentive plan. Other than augmenting merit pay, incentives shall not be used to supplement or substitute for annual compensation adjustments or other base pay movements. The statutory salary lid does not apply to these incentives. (9/1/12)
 - A. Departments must have an incentive plan prior to the use of incentives. Such plans shall include eligibility criteria, the types of incentives allowed, cash amounts or limits and payment methods, and a communication plan. Such plans shall be developed with the input of employees and managers.
 - 1. If a department uses a type of incentive that shares cost savings from innovations, the following applies.
 - a. Employees are ineligible if they are wholly responsible for control and operation of a division (or equivalent), the primary assignment includes responsibility for identifying efficiencies and cost reductions, or the position has statewide program or budget authority.
 - b. Savings are the result of innovative ideas that increase productivity and service levels while decreasing costs. Savings are not the result of normal progressive business evolution, obvious solutions to mandated budget cuts, cost avoidance or revenue enhancement, nor do they have adverse cost impact on other departments.
 - c. Savings are the difference between anticipated expenditures prior to implementation and actual expenditures following implementation for a full 12-month period. The complete award amount shall be no more than 10 percent of the first year's savings, not to exceed a total of \$1,000 per employee.
 - B. Incentive plans implemented prior to August 1, 2008, remain in effect, but shall be submitted to the director upon request. New or modified incentive plans shall be submitted to the director for review prior to implementation. The director's review shall be completed within 90 days, unless the director requires further information. In the event the director finds at any time that an incentive plan is inconsistent with guidance, rule or law, the department will make the appropriate changes. Failure to provide the incentive plan to the director as required may result in revocation of the incentive plan and delegated authority to grant incentives.
 - C. The incentive plan must be communicated to all employees prior to use and on an ongoing basis.
 - D. Records on any aspect of incentives must be provided to the director in a timely manner upon request.
- 3-22. Repealed. (8/1/08)
- 3-23. Repealed. (8/1/08)

Medical Plan

- 3-24. Employees in the medical pay plan shall be compensated based solely on performance as established in the required annual contract to be negotiated by July 1 of the contract year, or within 30 days of hire or movement within the medical pay plan for the remainder of the contract year. Employees are not eligible for any pay adjustments, such as merit pay. Current performance contracts may be modified during the contract year but not compensation. Change in compensation shall only occur at the end of a contract period, unless an employee moves to another position, and may increase, decrease, or remain unchanged from the previous year. In the case of upward or downward movement in the medical pay plan, compensation must be no lower than the minimum or higher than the maximum rates of the new grade and a new contract must be negotiated for the remainder of the contract year. (9/1/12)
 - A. If no contract is negotiated, the existing contract continues and base pay stays the same until a new contract is negotiated. Employees in the medical pay plan may grieve the rate unless it is lower, which is then subject to appeal. If the employee moves into or out of the medical pay plan into another open-range class, the base pay shall be negotiated subject to the grade maximum of the new class.

Senior Executive Service

3-25. Employees in the senior executive service shall be compensated based solely on performance as established in the annual contract, which must be negotiated by July 1 of the contract year, or within 30 days of hire or movement within the plan for the remainder of the contract year. All contracts expire on June 30 and no employee shall remain in the senior executive service without a contract. The salary shall not exceed the maximum allowed for the position in the management class by more than 25 percent. Employees are not eligible for any pay adjustments, such as merit pay. Current performance contracts may be modified during the contract year but not compensation. Compensation may only be changed at the end of a contract period, and may increase, decrease, or remain unchanged from the previous year. Compensation may change if the employee moves to another position. (9/1/12)

FLSA and Overtime

- 3-26. All employees are covered by the Fair Labor Standards Act (FLSA). Under FLSA, the state is considered to be a single employer. Employees cannot waive their rights under FLSA.
- 3-27. All full-time employees work a minimum of 40 hours during a standard workweek (168 consecutive hours in seven consecutive days). Appointing authorities may adopt different work periods for law enforcement and health care employees as permitted by federal law. (8/1/08)
- 3-28. Overtime is the time a non-exempt employee works in excess of the 40 hours during a standard workweek or in excess of established work hours in adopted work periods for law enforcement and health care employees. Such excess hours are paid at 1½ times the employee's regular hourly base pay rate, including applicable premium pay. Monetary payment must be made by the next regularly scheduled payday following the pay period in which it was worked. (8/1/08)
 - A. Overtime for non-exempt employees shall be approved in accordance with a department's procedure. A department head shall establish a policy to address unauthorized overtime work; however, prohibition of unauthorized overtime does not avoid the requirement to pay if it is actually worked.
 - B. Compensatory time in lieu of monetary payment is allowed if there is a written agreement between the department and any employee hired after April 15, 1986. Written

agreements for those hired prior to April 15, 1986, are unnecessary provided that the department had a regular practice in place for granting compensatory time. Acceptance of compensatory time may be a condition of employment for new employees. Appointing authorities must ensure that compensatory time is scheduled as soon as practical. Compensatory time shall not exceed 240 hours (or 480 hours for law enforcement) and any additional overtime must be paid at the next regular pay period. If a department wants to place limits on the accrual or payment of compensatory time, a policy must be developed and communicated prior to use and on an ongoing basis. Unused compensatory time at termination or transfer to another department must be paid at that time.

Eligibility

- 3-29. Department heads are responsible for determining if each position is exempt or non-exempt based on the actual duties performed regardless of class. Determinations must be entered into the payroll system and a record kept on file.
- 3-30. An exempt employee's pay is not subject to reduction except as follows. Deductions in increments of one day are allowed for a major workplace rule violation. Deductions are allowed for any amount of time if a leave of absence was not requested or was denied and accrued leave is not used; or is covered by the Family and Medical Leave Act (FMLA); or accrued leave is exhausted; or for voluntary furlough. In the case of mandatory furloughs for budgetary reasons, exempt status is not changed, except for the workweek in which the furlough occurs and pay is reduced. Improper reductions make the employee non-exempt. (7/1/06)
- 3-31. Exempt employees shall not be granted extra pay for hours worked in excess of 40 hours in a workweek. An appointing authority may grant discretionary administrative leave or other incentives but such awards shall not be tied to hours worked. (7/1/06)
- 3-32. An employee may request a review of a decision regarding eligibility, calculation of overtime hours, and payment to the Director in accordance with the "Dispute Resolution" chapter.

Dual Employment

3-33. In a properly authorized dual employment arrangement, the written agreement shall include the exemption status designation based on the combined duties, the department responsible for paying any overtime, and the overtime hourly rate. The overtime rate is either the regular rate from one of the jobs or a weighted rate from both jobs. Work time from both jobs is combined to calculate overtime.

Work Hours

- 3-34. In order to minimize overtime liability, appointing authorities may deny, delay, or cancel leave. Appointing authorities may require the use of accrued compensatory time but cannot schedule compensatory time if that will make an employee forfeit annual leave at the end of the fiscal year.
- 3-35. Compensatory time is not leave, but a form of compensation. Therefore, it is not included in the calculation of work hours for overtime purposes.
- 3-36. Overtime does not accrue until a non-exempt employee works more than the maximum hours allowed in a workweek or designated work period. All time worked must be recorded on a daily basis. Overtime is calculated based on the total time worked in the workweek or designated work period, rounded to the nearest quarter hour. If operational needs require an employee to regularly report to work early or leave late, that time is counted as work hours for weekly overtime purposes.

- 3-37. Essential, non-exempt positions, as designated by a department head, shall have paid leave counted as work time. Essential positions perform law enforcement, highway maintenance, and support services directly responsible for the health, safety, and welfare of patients, residents, students, and inmates.
- 3-38. Scheduled meal periods are discretionary. Scheduled meal periods are not work time and must be at least 20 minutes. However, if the employee is materially interrupted or not completely free from duties, the meal period is counted as work time.
- 3-39. Work breaks are discretionary. If granted, breaks of up to 20 minutes are work time. Breaks shall not offset other work time or substitute for paid leave, not be taken at the beginning or end of the workday, nor be used to extend meal periods.
- 3-40. Ordinary travel to and from work is not work time. Travel from work site to work site is work time. When an employee is required to travel a substantial distance to perform a job away from the regular work site, the travel is work time.
- 3-41. Mandatory training or meetings are work time. Voluntary training during work hours, as approved by the appointing authority, which is directly related to an employee's job and is designed to enhance performance, is work time. Voluntary training after hours to gain additional skill or knowledge is not work time, even if it is job related.

Recordkeeping

- 3-42. FLSA requires that certain basic records be maintained for both exempt and non-exempt employees. Each department is accountable for maintaining those records. (7/1/07)
- 3-43. Time records must be certified by both the employee and the supervisor and are the basis for overtime calculation and compensation.

Other Premium Pay

- 3-44. Shift Differential is additional pay beyond base pay for employees working shifts. Eligible classes are published in the annual compensation plan. Department heads may designate eligibility for individual positions in classes not published and shall maintain records for such cases. Shift differential does not apply to any periods of paid leave. Second shift rate applies when half or more of the scheduled work hours fall between 4:00 p.m. and 11:00 p.m. Third shift rate applies when half or more of the scheduled work hours fall between 11:00 p.m. and 6:00 a.m. If hours are evenly split between shifts, the higher shift differential rate applies to all hours worked during the shift.
- 3-45. <u>Call Back</u> applies when an eligible employee is required to report to work before the start or after the end of a scheduled shift. If there is no release from work between the call back hours and regular shift, it is considered a continuation of the shift and call back does not apply. When call back applies, a minimum of two hours pay is guaranteed. Eligible employees are those who are eligible for overtime, and any call back time is counted as work time. Employees exempt from overtime are also eligible when approved by a department head. (7/1/07)
- 3-46. On Call is additional pay beyond base pay for employees specifically assigned, in advance, to be accessible outside of normal work hours and where freedom of movement and use of personal time is significantly restricted. Eligible classes and the rate are published in the annual compensation plan. A department head may designate eligibility for individual positions in classes not published and maintain records of such on-call designations. Only time while actually on call shall be paid at the special rate. In call back situations, employees eligible for both on call and call back pay shall receive call back pay only. (7/1/07)

- 3-47. Second Domicile is additional discretionary pay up to 10 percent of base pay for employees who are required to maintain a second domicile for more than 10 consecutive calendar days while working out-of-state on official state business. The department head must authorize such payments.
- 3-48. Commission Award is non-base building pay in addition to base pay or other non-base building awards for employees in eligible classes and positions as approved by the Director, i.e., retail sales and collections. The amount of commission is paid according to a plan established by a department head and approved by the Director for individual or team performance.
- 3-49. Housing Premium is a stipend granted by a department head to designated employees living and working in high housing cost areas with demonstrated recruitment and retention problems. It is not part of the base rate and may begin or end at any time. Records on any aspect of this premium must be provided to the Director when requested.
- 3-50. <u>Discretionary Pay Differentials</u>. A department may use non-base building discretionary pay differentials on a temporary basis, which shall be funded within existing budgets. Use of these pay differentials is at the discretion of the appointing authority and shall not be used as a substitute for annual compensation adjustments, other pay policies, or promotions. No differential is guaranteed and, if granted, may be discontinued at any time. No aspect of any discretionary pay differential is subject to grievance or appeal, except for discrimination; however, an alleged violation of the department's plan can be disputed. A department's decision in the dispute is final and no further recourse is available. Departments must develop and communicate a written plan addressing appropriate criteria for the use of any differential based on sound business practice and needs. If granted, there must be an individual written agreement between the employee and appointing authority that stipulates the terms and conditions of the differential, including the dates the differential will begin and end. Records of any aspect of these differentials must be provided to the Director when requested. (8/1/08)
 - A. Counteroffer to a verifiable job offer may be used when an employee with *critical strategic* skills receives a higher salary offer from another department or outside employer and the appointing authority needs to retain the employee. The sum of a non-base building differential and current base pay cannot exceed a statutory lid in any given month and may be paid in one or more payments. (8/1/08)
 - B. Signing bonus is a non-base building lump sum that may be used to attract new permanent employees into the state personnel system. It may be paid in one or several payments; however, the sum of the bonus and current base pay cannot exceed a statutory lid in any given month. Signing bonuses may be used for the following reasons:
 - 1. to fill positions in critical occupations where there is a documented shortage in the labor market and recruitment or retention difficulty in the department that jeopardizes its mission; or,
 - 2. when the applicant possesses a unique, critical skill in relation to the job market.
 - C. Referral award is a non-base building lump sum that may be granted to a current employee for the referral and subsequent hire of a new employee into the state personnel system where the position requires a unique, specialized skill and there is a documented shortage in the labor market and recruitment or retention difficulty in the department. This award is to be used for permanent employees unless the Director grants an exception. Employees who influence or are responsible for hiring and those performing recruitment as part of their regular assignments are ineligible. The sum of the award and current base pay cannot exceed a statutory lid in any given month.
 - D. Temporary pay differential is a non-base building award that may be granted to a current permanent employee in the same position. The sum of the temporary award and current

base pay shall not exceed a statutory lid in any given month and is paid through regular payroll. This differential shall not be used as a substitute for the promotional or allocation process. Temporary pay differentials may be used for the following reasons:

- acting assignment where the employee assumes the full set of duties (not "in absence of") of a higher-level position that is vacant or the incumbent is on extended leave for a period longer than 30 days but less than six months. The differential shall not exceed six months for any given acting assignment;
- 2. long-term project assignment that is not an expected or customary part of the regular assignment and is critical to the mission and operations of the department as defined by the purpose of the project, its time frame, and the critical nature and expected results; or,
- 3. retain a unique, specialized set of skills or knowledge that is critical to the mission and productivity of the department. The loss would result in documented severe adverse effect on the department's mission and productivity.
- 3-51. Hazardous Duty is a non-base building premium that may be granted to positions working in occupations where exposure to physical hazards is not a customary part or expectation of the occupation and its preparation for entry. Such positions work for a majority of their time in settings that involve clear, direct, and unavoidable exposure to risk of major injury or loss of life even after making allowances for safety. This premium is not guaranteed and, if granted, may be discontinued at any time. No aspect of this premium pay can be grieved or appealed, except for alleged discrimination. Departments must develop appropriate criteria for the use of hazard pay based on sound business practice and need, and communicate these criteria prior to use of this premium. The premium rate will be published in the annual compensation plan and, in combination with current base pay and other premium pay, cannot exceed a statutory lid in any given month.

Postemployment Compensation (9/1/12)

- 3-52. Postemployment compensation, or Voluntary separation incentives are discretionary financial payments that may be offered to certified employees when a layoff has happened or may happen based upon documented lack of funds, lack of work, or reorganization. Post employment compensation may include, but is not limited to, a hiring preference, payment towards the continuation of health benefits, tuition or educational training vouchers, portion of salary, placement on a reemployment list. Postemployment compensation may be contingent upon an employee's waiver of retention and reemployment rights, but waiving those rights does not affect the employee's eligibility for reinstatement. A department head must establish a postemployment compensation plan before a department makes any separation incentive offers. (9/1/12)
- 3-53. Any total post employment compensation payment shall not exceed an amount equal to one week of an employee's salary for every year of his or her service, up to 18 weeks. Any additional limitations shall be established and published by the director, taking into consideration prevailing market practice and other factors. (9/1/12)
- 3-54 Severance pay is a discretionary financial payment that may be offered to certified employees separated from state service. (9/1/12)
- 3-55. The employee and department must execute a written contract before payment of any post employment compensation, voluntary separation incentive or severance payment. The contract must include the following provisions. (9/1/12)
 - 1. A statement that the employee is required to pay all applicable taxes on the payment;
 - 2. The employee's acknowledgement that the state will withhold taxes according to law before payment;

- 3. The employee's agreement to waive retention and reemployment rights, if applicable, along with a statement that the contract is voluntary and not coerced or obtained through means other than the terms of the contract; (9/1/12)
- 4. The date of the employee's last day of work;
- 5. An acknowledgement that no payment will be made until after the last day of work and compliance with other provisions of the contract; and,
- 6. Upon signature, a copy of each contract must be provided to the state personnel director. (9/1/12)
- 7. The employee's agreement to waive any and all claims they may have or assert against the employer, relative to their employment prior to the execution of this agreement. (9/1/12)

Chapter 6 Performance

Authority for rules promulgated in this chapter is found in §§24-50-104(1)(c) and (c.5), and 24-50-125, C.R.S. Board rules are identified by cites beginning with "Board Rule".

General Principles

- Board Rule 6-1. Employees represent the state so they are required at all times to use their best efforts to perform assigned tasks promptly and efficiently and to be courteous and impartial in dealing with those served. Employees may be rewarded based on their level of performance.
- Board Rule 6-2. A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

Performance Management

- Board Rule 6-3. Appointing authorities and designated raters are responsible for communicating the department's performance pay program and the performance expectations and standards, including an individual written performance plan, and for evaluating performance in a timely manner in accordance with rule.
- 6-4. The Director shall establish requirements governing the performance management system. The performance management system does not apply to employees in the senior executive service or medical plan. Departments must develop a performance management program that includes the dispute resolution process and is approved by the Director before implementation. All employees shall be evaluated, in writing, at least annually based on the past year's performance. If an employee moves to a position under another appointing authority or department during a performance cycle, an interim overall evaluation shall be completed and delivered to the new appointing authority or department within 30 days of the effective date of the move. No evaluation is required when an employee retires from employment in the state personnel system. These requirements shall be applied by all appointing authorities and designated raters, including any person employed by the state who supervises an employee. The department's performance management component must include the following. (8/1/08)
 - A. A detailed training plan for employees and raters. Training is mandatory for all raters.
 - B. Incorporate into each individual performance plan and evaluation the statewide, uniform core competencies defined by the Director. The statewide, uniform core competencies cannot be disregarded in the final overall rating for each employee.

- C. Develop a performance evaluation form.
- D. The statewide uniform performance cycle shall be April 1 to March 31. (7/1/06)
- E. A planning meeting with the employee that shall occur by the date specified in the department's performance management program. (7/1/07)
- F. Allow for coaching and feedback during the performance cycle including at least one documented progress review.
- G. Specify whether the performance evaluations are numerical, qualitative, or a combination that conforms to one of the performance rating levels. The Director shall define the performance rating levels and publish these standard definitions in written directives. A department's performance management program and forms shall contain the standard definitions. Departments may further define the levels in relation to mission and operational needs providing that such expansion falls within these required definitions. Beginning with the performance cycle on April 1, 2007, for merit pay payable on July 1, 2008, three rating levels will be used. (9/1/12)
- H. Shall not establish a quota for the number of employees allowed to receive any of the performance ratings.
- I. Develop an accountability component to ensure compliance with the performance management system and the department's program. Such programs shall specify the sanctions, including those required by these provisions and statute, to be imposed for any rater employed by the state who fails to complete the performance plan or evaluation. (7/1/07)
- J. Repealed. (7/1/07)
 - 1. Repealed. (7/1/07)
- K. A description of the department's review process to monitor the quality and consistency of performance ratings within the department before final overall ratings are provided to employees.
- 6-5. Designated raters shall be evaluated on their performance management and evaluation of employees. Absent extraordinary circumstances, failure to plan and evaluate in accordance with the department's established timelines results in a corrective action and ineligibility for merit pay. If the individual performance plan or evaluation is not completed within 30 days of the corrective action, the designated rater shall be disciplinarily suspended in increments of one workday following the pre-disciplinary meeting. (9/1/12)
 - A. A reviewer must sign the rater's evaluation of an employee. If the rater fails to complete an individual performance plan or evaluation, the reviewer is responsible for completion. If the reviewer fails to complete the plan or evaluation, the reviewer's supervisor is responsible, on up the chain of command until the plan or evaluation is completed as required. If a rating is not given, the overall evaluation shall be satisfactory until a final rating is completed.
- Board Rule 6-6. A needs improvement performance rating shall result in a performance improvement plan or a corrective action and a reasonable amount of time must be given to improve, unless the employee is already under corrective or disciplinary action for the same performance matter. A performance improvement plan is not a corrective action. If performance is still unsatisfactory at the time of reevaluation under a performance improvement plan, a

corrective action shall be given. If performance is still unsatisfactory at the time of reevaluation under a corrective action, the appointing authority may take disciplinary action up to and including demotion or termination.

6-7. Each department head will report required information to the Director by the specified deadline.

Corrective And Disciplinary Actions

- Board Rule 6-8. An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature. Corrective and disciplinary actions can be issued concurrently.
- Board Rule 6-9. The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered.
- Board Rule 6-10. When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision. The appointing authority and employee are each allowed one representative of their choice. Statements during the meeting are not privileged.
 - A. When reasonable attempts to hold the meeting fail, the appointing authority must send a written notice, to the last known address of the employee, advising the employee of the possibility of discipline and stating the alleged reasons. The employee has 10 days from receipt of the notice to respond in writing. If the employee refuses to accept the notice, a dated return receipt from a mail carrier is conclusive proof of the attempt to deliver and the period to respond begins on that date.
- Board Rule 6-11. Corrective action is intended to correct and improve performance or behavior and does not affect current base pay, status, or tenure. It shall be a written statement that includes the areas for improvement; the actions to take; a reasonable amount of time, if appropriate, to make corrections; consequences for failure to correct; and a statement advising the employee of the right to grieve and the right to attach a written explanation. It may also contain a statement that the corrective action will be removed from the official personnel records after a specified period of satisfactory compliance. A removed corrective action cannot be considered for any subsequent personnel action.
- Board Rule 6-12. Disciplinary actions may include, but are not limited to: an adjustment of base pay to a lower rate in the pay grade; base pay below the grade minimum for a specified period not to exceed 12 months; prohibitions of promotions or transfers for a specified period of time; demotion; dismissal; and suspension without pay, subject to FLSA provisions. Administrative leave during a period of investigation is not a disciplinary action. At the conclusion of discipline involving temporary reductions in base pay, it shall be restored as if the discipline had not occurred. Reasons for discipline include:
 - 1. failure to perform competently;
 - 2. willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
 - 3. false statements of fact during the application process for a state position;

- 4. willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform:
- 5. final conviction of a felony or other offense of moral turpitude that adversely affects the employee's ability to perform the job or may have an adverse effect on the department if employment is continued. Final conviction includes a no contest plea or acceptance of a deferred sentence. If the conviction is appealed, it is not final until affirmed by an appellate court; and,
- 6. final conviction of an offense of a Department of Human Services' employee subject to the provisions of §27-1-110, C.R.S. Final conviction includes a no contest plea or acceptance of a deferred sentence. If the conviction is appealed, it is not final until affirmed by an appellate court.
- A. An employee who is charged with a felony or other offense of moral turpitude that adversely affects the employee's ability to perform the job or may have an adverse effect on the department may be placed on indefinite disciplinary suspension without pay pending a final conviction. If the employee is not convicted or the charges are dismissed, the employee is restored to the position and granted full back pay and benefits. Department of Human Services' employees charged with an offense as defined in §27-1-110, C.R.S., may be indefinitely suspended without pay pending final disposition of the offense.
- B. If the Board or administrative law judge finds valid justification for the imposition of disciplinary action but finds that the discipline administered was arbitrary, capricious, or contrary to rule or law, the discipline may be modified.
- Board Rule 6-13. Corrective and disciplinary actions are subject to the "Dispute Resolution" chapter. An appointing authority who has decided to discipline may also discuss alternatives with the employee in an attempt to reach a mutually acceptable resolution. If no resolution is reached, the employee retains the right to appeal. When resigning in lieu of disciplinary action, the employee forfeits the right to file any appeal.
- Board Rule 6-14. The person conducting the meeting is responsible for the decision to take disciplinary action. The decision is made after consideration of all written and verbal information collected.
- Board Rule 6-15. A written notice of disciplinary action must be sent to the employee's last known address, by certified mail, or may be hand-delivered to the employee. The employee must receive the notice no later than five days following the effective date of the discipline. The notice must state the specific charge, the discipline taken, and right to appeal, including the time frame for such an appeal, and the Board's address and telephone and facsimile numbers for filing the appeal. Employees may submit a written statement to be attached to disciplinary action. (1/1/07)
 - A. If the employee refuses to accept the notice, a dated return receipt from a mail carrier is conclusive proof of the attempt to deliver.

Chapter 7 Separation

Authority for rules promulgated in this chapter is found in Colo. Const. art. XII, Sections 13, 14 and 15; §§ 24-50-109.5, 124, 126 and 136, C.R.S. Board rules are identified by cites beginning with "Board Rule".

General Principles

Board Rule 7-1. The appointing authority must communicate, or make a good-faith effort to communicate, with an employee before conducting any involuntary separation. The

communication may be oral or written, and must provide an opportunity for the appointing authority and employee to exchange information about the separation.

- Board Rule 7-2. The State of Colorado seeks to promote progressive employment practices. As such, the Board strongly encourages the Governor, Director, and all appointing authorities to consider alternatives to minimize or avoid the need for layoffs of employees in the state personnel system including, but not limited to, placement into vacant positions for which the laid off or displaced employees are qualified but for which they do not have retention rights, retraining, voluntary reduction in hours or pay, job-sharing, voluntary unpaid leave, voluntary furloughs, and voluntary separation incentives. (10/1/07)
- Board Rule 7-3. Department heads shall administer the layoff process for any affected employee in accordance with these rules. Appointing authorities cannot use the layoff process as a substitute for disciplinary or corrective action. The layoff process should not prevent or interfere with other personnel actions.

Resignation

- Board Rule 7-4. An employee must give notice of resignation directly to the appointing authority at least 10 working days before its effective date, unless the employee and appointing authority mutually agree to less time. Failure to provide written notice, as required by § 24-50-126(1), C.R.S., may result in a delay in payout of leave and forfeiture of reinstatement privileges. If the notice is oral, the appointing authority shall provide written confirmation as soon as possible. If the employee believes the resignation was coerced or forced, the employee has 10 days from the date of the resignation to appeal to the Board, except that an employee cannot appeal a resignation that is tendered in lieu of disciplinary action. Upon receipt of any written notice of resignation or upon an appointing authority providing a written confirmation of an oral resignation, an employee must be notified, in writing, of the right to appeal a coerced or forced resignation, including the time for such an appeal, and the Board address and telephone and facsimile numbers for filing the appeal. The 10 days for an employee to appeal to the Board an alleged coerced or forced resignation shall be from the date of receipt by the employee of the notification of appeal rights. If an employee tenders a resignation in lieu of disciplinary action, the employee shall be notified in writing that he or she has waived his or her right to appeal the resignation to the Board. (7/1/09)
- Board Rule 7-5. An employee who has submitted a notice of resignation at least 10 working days before its effective date may withdraw a resignation by the close of two business days after giving notice of resignation. The day that notice of resignation is given shall not be counted. A business day shall be the normal hours of operation for the department or employee's division. However, if the department or employee's division operates on a 24-hour basis, the business day shall end at midnight. The appointing authority must approve a timely withdrawal of resignation. Approval of a request to withdraw a resignation when that request is made more than two business days after the notice of resignation is within the discretion of the appointing authority. (10/1/07)
- Board Rule 7-6. If an employee is absent without notice for five or more scheduled consecutive working days and has not contacted the supervisor or appointing authority to provide information about the reason for the absence, the appointing authority may construe that absence as an automatic resignation. The appointing authority shall give the employee written notice, by certified mail, of the effective date of the employee's resignation. The employee is ineligible for reinstatement.

Layoff Principles

Board Rule 7-7. The only reasons for layoff are lack of funds, lack of work, or reorganization. These rules apply to any reduction in force that results in the elimination of one or more positions regardless of the reason for layoff. (10/1/07)

- A. For any and all layoffs, department heads have the discretion initially to make the business decisions as to how their department will continue to meet its mission after engaging in the layoff process. These decisions include determining which classes or class series will best help the department meet its mission, the level of staffing by various classifications and/or class series and the agency functions to be staffed, either by facility location or department-wide, and must meet any constitutional or statutory mandates. A department head may delegate this authority to make any of the business decisions to subordinate appointing authorities within the department. Such delegation must be in writing and describe the parameters of the business decisions to be made by the subordinate appointing authority.
- B. Layoff Plan: For any and all layoffs, after making its business decisions and ten days prior to issuing the first layoff notice, the department shall post a Layoff Plan, signed by the Executive Director, head of a principal department or designee, both in a conspicuous place where all impacted parties have access to view the posting and on the department's internet or intranet websites. The purpose of the Layoff Plan is to facilitate strategic planning prior to the abolishment of any positions and to provide an open and transparent explanation for the elimination of positions and/or services. The Layoff Plan shall include the following: a description of the planned changes in the fundamental structure, positions, or functions accountable to one or more appointing authorities; an organizational chart setting out the planned changes in the fundamental structure, positions, or functions accountable to one or more appointing authorities; the reasons for the change; the anticipated benefits and results, including any cost savings; a general description of the expected changes and their effects on employees; a description of how the work performed by the eliminated positions will be absorbed by the department; a listing of the classes in which positions will be abolished as contemplated in the Layoff Plan; and, if there have been any modifications to the special qualifications for positions affected by the Layoff Plan within sixty days or less prior to publication of the Layoff Plan, a list of such positions.
 - 1. When a function and position are transferred to another department, the employee occupying the position transfers.
- Board Rule 7-8. After an appointing authority has made the initial business decisions and posted the department's Layoff Plan, the layoff of individual employees and the subsequent calculation of their retention rights must be made in accordance with the Board rules setting forth the priorities for determining layoff and retention rights. (10/1/07)
- 7-8.1 The layoff of certified employees who, on or before January 1, 2013, are within five years from being eligible for full retirement pursuant to section 24-51-602 (1)(a) C.R.S. is to be in accordance with the board rules within this chapter. Layoff decisions for all other certified employees after September 1, 2012 is to be in accordance with this chapter, except as in Board Rule 7-9, Board Rule 7-10, Board Rule 7-11, Board Rule 7-12, Board Rule 7-13, Board Rule 7-18 and as set forth below; (9/1/12)
 - A. Departments shall establish a matrix for each layoff which gives consideration to total state service and performance evaluations in a consistent manner for all affected employees in a retention area. (9/1/12)

Determining Priorities for Layoff and Retention Rights

Board Rule 7-9. In making both layoff and retention rights decisions, departments shall first use time bands to determine seniority as set forth below in Board Rule 7-10. After placing employees

into time bands, departments shall then apply a matrix, prepared and posted as set forth below in Board Rule 7-11. For purposes of this chapter, the term "displaced" shall include both employees who are initially laid off under the Layoff Plan and employees who, as the result of other employees exercising their retention rights, are laid off. (10/1/07)

- Board Rule 7-10. Time Bands: Time bands for each of the affected classes are established for three-year periods based on seniority. The three-year period begins with the calendar year in which the layoff notice is given and extends backward, e.g., a notice issued in 2007 creates the most junior time band of 2005-2007, the next time band would be 2002-2004. For each affected class set out in the Layoff Plan, employees in the most junior time band must be displaced before employees in more senior time bands. (10/1/07)
 - A. Seniority is the calendar year in which continuous state service began, plus up to 10 additional years (rounded to the next whole year for partial years) of military service for those eligible for veteran's preference.
 - B. Continuous state service includes permanent status and state employment outside the state personnel system. An employee who has a break in service of 90 days or less, time on a departmental reemployment list or waiting for retention rights, or approved leave receives credit for continuous state service during those periods. If an employee has a break in service of more than 90 days, previous state service does not count toward seniority during layoff.
- Board Rule 7-11. Matrix: The purpose of the matrix is to rank employees within the time bands. The department head must establish the matrix for the entire department. The matrix must be consistently applied throughout each retention area within the department. The matrix must be communicated to all employees at least 15 days before the first layoff notice is issued. Employees with lower matrix rankings in the time band must be displaced before employees with higher matrix rankings, except, as set forth in art. XII, Section 15 of the Colorado Constitution, no veteran can be displaced before a non-veteran regardless of rank. (10/1/07)
 - A. The matrix must give at least 51 percent of the total value to performance measured by the average of the latest three years' annual performance ratings. Each department must establish a consistent numerical value for each level of performance designated by the State Personnel Director. If an employee does not have performance ratings for any of the past three years, any missing rating is considered to be the average of the numerical values assigned to the available ratings in the past three years.
 - B. If there is a tie under the department's matrix, then the employee with the earliest start date of employment with the State of Colorado shall be the higher ranked employee. If the employees are still tied, then the decision shall be made by taking into account the affirmative action program established by the State Personnel Director pursuant to § 24-50-101(3)(e), C.R.S.

7-11.1

The purpose of a matrix is to rank employees within a retention area. The department head must establish the matrix for employees potentially covered by the layoff plan. The matrix must be consistently applied throughout each retention area within the department. The matrix must be communicated to all affected employees at least 15 days before the first layoff notice is issued. Employees with lower matrix rankings must be displaced before employees with higher matrix rankings, except as set forth in Art. XII, Section 15 of the Colorado Constitution, no veteran can be displaced before a non-veteran regardless of rank. (9/1/12)

A. The matrix must give consideration to total state service and performance evaluations in a consistent manner for all affected employees in a retention area. Each department

- must establish a consistent numerical value for each performance rating level designated by the state personnel director. (9/1/12)
- B. If there is a tie under the department's matrix, then the employee with the earliest start date of employment with the state of Colorado shall be the higher ranked employee. If the employees are still tied, then the decision shall be made by taking into account any affirmative action program established by the state personnel director pursuant to § 24-50-101(3)(E), C.R.S. (9/1/12)
- 7-11.2 When a person is separated from state service based upon documented lack of funds, lack of work or reorganization, an appointing authority shall consider placing the displaced person into a vacant funded position for which they qualify. An appointing authority should consider prior experience, past performance and tenure in making such decision. (9/1/12)
- Board Rule 7-12. Trial service employees whose performance is satisfactory are treated as if certified in the trial service class during the layoff process. Conditional employees have retention rights to their previously certified class. (10/1/07)
- Board Rule 7-13. Full-time certified employees whose positions are reduced to part time are eligible for retention rights. Full-time employees shall be offered other full-time positions before part-time. Part-time certified employees whose positions are increased to full time are eligible for retention rights. Part-time employees shall be offered other part-time positions in the current certified class then offered full-time positions in the current certified class, prior to the offer of retention rights in any class or class series to which previously certified. A full-time employee who accepts a part-time position and a part-time employee who accepts a full-time position may choose to be placed on a departmental reemployment list. (10/1/07)

Notice Requirements

- Board Rule 7-14. The department must provide written notice to certified employees who are to be laid off at least 45 calendar days before the layoff is effective. The layoff notice must give the employees at least three working days from the date of delivery to state whether they want the department to determine their retention rights. If the department offers retention rights, it must give the employees at least three working days to accept or reject the offer. The layoff notice may be hand-delivered directly to the employee or sent by certified mail to the employee's last known address, in which case it is deemed delivered when it is actually received or five days after the certified mailing, whichever is earlier. In addition, notification by email shall be sent to the employee, if the employee has a state email address. (10/1/07)
 - A. The department must provide written notice to certified employees who are being displaced by another employee at least 10 business days before the displacement. A displaced certified employee who is separated shall be paid for at least 22 working days after receipt of the notice of displacement.
 - B. The department must provide written notice to non-certified employees who are to be laid off at least 10 business days before the layoff is effective.

Retention Areas

Board Rule 7-15. (7/1/09)

- A. A certified employee may exercise retention rights within the principal department in which the certified employee is employed.
- B. Institutions of higher education have the following separate retention areas: each state college, each community college, each university, each campus of the University of Colorado, University of Colorado system administration,

- each junior college, Auraria Higher Education Center, and central staff of Community Colleges of Colorado.
- C. The Department of Higher Education shall be a separate retention area in which certified employees in central staff and Colorado College Access Network shall have retention rights.
- D. The Colorado Historical Society shall be a separate retention area in which certified employees employed therein shall have retention rights.
- E. For purposes of these layoff rules, the Governor's Office, and any units or offices created within the Governor's office, shall be considered a retention area
- Board Rule 7-16. A department, upon approval of the Board, may limit retention rights to major divisions of the department only if its department head requests the limitation and the Board approves that request at least thirty days in advance of the posting of the Layoff Plan required by Board Rule 7-7. Any request to limit retention rights must set forth a reasonable basis for the request. (10/1/07)
- Board Rule 7-17. Any request to limit retention areas must be submitted in writing on or before the twelfth day before the monthly Board meeting at which the request will be considered. A copy of the request to limit retention areas shall be provided to all affected employees by mail to their home addresses and by email to their state email address, if any, on or before submittal of the request to the Board. Any parties opposing such a request may either submit a written opposition prior to the Board meeting or testify before the Board at the time of the Board meeting. The requestor may either submit a written response to the opposition or testify before the Board at the time of the Board meeting. (10/1/07)

Retention Rights

- Board Rule 7-18. An employee must meet the minimum qualifications and any bonafide special qualifications in order to have retention rights to a position. Departments may not modify special qualifications of any position in a class series impacted by a layoff after the publication of the Layoff Plan. Certified employees can displace certified employees in more junior time bands. If there are no junior time bands, certified employees can displace lower-ranked certified employees in the same time band. (7/1/09)
 - A. The department shall offer retention rights in the following priority.
 - First, to any funded vacant position in the current certified class. If there are no funded vacant positions, then positions occupied by the following types of employees are offered in the following order: provisional, probationary, conditional, certified. If there are multiple occupied positions in the current certified class and the occupants of those positions are certified, then the lowest ranked employee within the most junior time band shall be displaced first.
 - 2. If there are no available funded vacant or occupied positions in the current certified class, then a funded vacant position in a previously certified class at the same maximum pay rate. If there are no funded vacant positions, then positions occupied by the following types of employees shall be offered in the following order: provisional, probationary, conditional, certified. If there are multiple occupied positions in a previously certified class at the same maximum pay rate and the occupants of those positions are certified, then the lowest ranked employee within the most junior time band shall be displaced first.
 - 3. If there are no available funded vacant or occupied positions in the current or a previously certified class at the same maximum pay rate, then the highest level

demotion in a vacant position in the current or a previously certified class series. If there are no vacant positions, positions occupied by the following types of employees shall be offered in the current or a previously certified class series in the following order: provisional, probationary, conditional, certified. If there are multiple occupied positions in the highest level demotion in the current or a previously certified class series and the occupants of those positions are certified, then the lowest ranked employee within the most junior time band shall be displaced first. An employee can displace another employee only if the displacing employee has been certified in the class.

- B. For those departments with multiple work locations throughout the state, the department shall offer retention rights in the following order:
 - 1. Within a 75-mile radius of the employee's current work location, funded vacant positions in the current certified class.
 - 2. If there are no funded vacant positions in the current certified class, positions occupied by the following types of employees in the current certified class within a 75-mile radius are offered in the following order: provisional, probationary, conditional, certified. If there are multiple occupied positions in the current certified class within the 75-mile radius, and the occupants of those positions are certified, then the lowest ranked employee within the most junior time band shall be displaced first.
 - 3. If there are no available funded vacant or occupied positions in the current certified class within a 75-mile radius, then a funded vacant position in a previously certified class at the same maximum pay rate. If there are no funded vacant positions, then positions occupied by the following types of employees shall be offered in the following order: provisional, probationary, conditional, certified. If there are multiple occupied positions in a previously certified class at the same maximum pay rate and the occupants of those positions are certified, then the lowest ranked employee within the most junior time band shall be displaced first.
 - 4. If there are no available funded vacant or occupied positions in the current or a previously certified class at the same maximum pay rate within a 75-mile radius, then the highest level demotion within a 75-mile radius in a vacant position in the current or a previously certified class series. If there are no vacant positions, positions occupied by the following types of employees shall be offered in the current or a previously certified class series in the following order: provisional, probationary, conditional, certified. If there are multiple occupied positions in the current or a previously certified class series within the 75-mile radius, and the occupants of those positions are certified, then the lowest ranked employee within the most junior time band shall be displaced first. An employee can displace another employee only if the displacing employee has been certified in the class.
 - 5. If the only retention opportunity within a 75-mile radius is a demotion, then in addition to the offer of that demotion, the employee shall be given retention rights outside of the 75-mile radius to a position in the current certified class.

C. (Deleted 7/1/09)

Board Rule 7-19. If the employee accepts an offer outside the 75-mile radius, that employee can claim moving expenses as prescribed in fiscal rule. (10/1/07)

Reallocation

Board Rule 7-20. If a position is allocated downward and the employee elects not to remain in the position or if a position is allocated upward and the employee does not qualify, is not appointed or

elects not to remain in the position, the employee will be laid off or given retention rights pursuant to the provisions of this chapter. If a certified employee is laid off or demoted due to an upward or downward allocation or layoff, the employee is placed on a departmental reemployment list. If an employee refuses a retention offer, the employee is laid off and placed on the departmental reemployment list. (10/1/07)

Appeals

Board Rule 7-21. All employees whose positions have been eliminated or who have been upwardly or downwardly allocated to a different class in the course of a layoff shall have a mandatory right to a hearing before the State Personnel Board. Acceptance of retention rights to another position does not eliminate the employee's appeal rights. (7/1/09)

Recordkeeping

Board Rule 7-22. Department heads must provide any required or requested information to the Director or Board in a timely manner. (10/1/07)

Chapter 8 Dispute Resolution

Authority for rules promulgated in this chapter is found in §§24-50-103, 104, 104.5, 123, 125.3, 125.4, 125.5, 131, 24-50.5-101 to 107, 24-50-112.5, 24-4-105 and 106, 24-11-110, and 24-34-402, C.R.S. Board rules are identified by cites beginning with "Board Rule".

General Principles

- Board Rule 8-1. Disputes should be resolved at the lowest level and as informally as possible. Fair and unbiased resolutions should be reached as quickly as possible. As such, parties are encouraged to use alternative dispute resolution methods, including those provided in this chapter, in an attempt to reach early solutions.
- Board Rule 8-2. Appeals may be dismissed if the employee, applicant, or department does not keep the Board informed of the proper email address or mailing address, fails to appear for a hearing either personally or through counsel, or if the appeal does not meet the requirements of these rules. (12/1/09)
- Board Rule 8-3. Any person may file a complaint concerning a state employee's action. If the complaining party is an employee in the same department, the grievance procedure adopted by the department, or if none, as provided in this chapter, is to be used. If the complaining person is outside the department or the state personnel system, the person shall file a written complaint with the employee's appointing authority within a reasonable time period. The appointing authority will review a complaint and take the appropriate action, if any.

Notice Of Appeal Rights—Corrective Or Disciplinary Actions

Board Rule 8-4. Affected persons shall be informed, in writing, of any rights to dispute a corrective action or an action that adversely impacts pay, status, tenure, or a performance rating and award. Such a notice must include the time limit to exercise such rights, the official and address to whom the dispute should be directed, the requirement that the dispute must be in writing, and the availability of any standard appeal form. If the dispute alleges discrimination, refer to the "Allegations of Discrimination" section of this chapter.

Board's Dispute Resolution Processes

Grievance Procedures

- Board Rule 8-5. A permanent employee may grieve matters that are not subject to appeal or review by the Board or Director. Issues pertaining to leave sharing, discretionary pay differentials, granting or removal of in-range salary movements, or the performance pay system that do not result in corrective or disciplinary action are not subject to grievance or appeal. Use of the grievance process is not required prior to disciplining an employee based on sexual harassment.
- Board Rule 8-6. Once a final written grievance decision is rendered by the highest level of relief in a department, an employee may petition the Board for discretionary review pursuant to the discretionary Board hearing section of this chapter.
- Board Rule 8-7. If the complaining employee is no longer employed under the state personnel system, any grievance in process at the department level is considered concluded.
 - A. If the complaining employee is separated from employment and does not appeal that separation to the Board, any grievance in progress at the department or Board level is considered concluded.
 - B. If an employee is restored to a position following involuntary separation, by Board order, settlement or reemployment, any unrelated grievance pending at the time of separation shall be processed.

Grievance Process

- Board Rule 8-8. The grievance process is designed to address and resolve problems, not to be an adversarial process.
 - A. Each department shall establish a process that complies with the following requirements.
 - 1. All employees must be informed in writing how to initiate and proceed though the grievance process, including all deadlines.
 - 2. An employee must initiate the grievance process within 10 days of the action or occurrence being grieved; or within 10 days after the employee has knowledge of, or reasonably should have knowledge of, the action or occurrence.
 - 3. To initiate the grievance process, the employee shall notify the supervisor and/or second level supervisor, as provided in the department's grievance process. An informal discussion will be held to attempt to resolve the grievance. The employee shall be informed in writing of the decision within 7 days after the discussion. If a timely decision is not issued, the employee may proceed to the next stage of the process.
 - 4. The decision reached at the informal stage shall be binding on the parties, unless the employee elects to proceed to the formal written process. The employee has 5 days after receipt of the informal decision to initiate the formal grievance process. The formal grievance must be in writing and submitted to the department's appointing authority. Only the issues set forth in the written grievance shall be considered thereafter.
 - 5. The appointing authority will issue the final department response to the grievance. The appointing authority may appoint an objective person or panel to make recommendations, or may delegate the decision. If the grievance concerns the actions of the appointing authority the department may, but is not

- required to, provide a process by which a different individual issues the final department response.
- 6. The process is deemed completed upon issuance of a final department decision, which must be in writing and issued within 30 days of the initiation of the written grievance process. The final written grievance decision must notify the employee of the right to appeal the final decision, including the time frame for such an appeal, and the Board address and telephone and fax number for filing the appeal.
- 7. Any of the time frames for completion of the grievance process may be waived or modified if agreed to by both parties, including deferral of action to allow the parties a chance to resolve the issue.
- 8. The final decision is binding unless the employee pursues it to the Board.
- 9. If a final decision is not issued in a timely manner, the employee may pursue the grievance with the Board.
- B. The employee has 10 days to file a petition for hearing with the Board after receipt of the final department decision, or after expiration of 30 days of initiation of the written grievance process or any extension period granted by the Board. The original written grievance and the department's final decision shall be attached to the petition for hearing. A copy must be provided to the person who made the department's final decision.
- C. An employee may be represented by any person of the employee's choice at any step(s) of the grievance process. That person may participate and speak for the employee. However, the employee is expected to participate in the discussion during the grievance process.
- D. In the event a department fails to establish a grievance process, it is deemed to have waived the opportunity to establish a departmental grievance process and must apply the elements established above for resolving grievances.

Alternative Dispute Resolution (Informal problem-solving processes)

Mediation

Board Rule 8-9. At the option of either party, mediation may be used in an attempt to resolve disputes. If the mediation also involves a grievance, the other party must participate and time limits governing the grievance process are suspended pending the outcome or discontinuance of mediation. Parties participating shall have authority to settle disputes at the time of mediation.

Board Rule 8-10. An administrative law judge may require a mediation conference.

Board Rule 8-11. Mediation is private, confidential, and privileged. A trained, unbiased facilitator, who assists the parties in clarifying and understanding their different points of view, identifying common ground, generating and evaluating alternatives, and reaching a mutually acceptable resolution, conducts it. Mediator notes are confidential and must be destroyed after mediation. The mediator cannot be contacted for information or called as a witness in other later proceedings. Communication during mediation is not discoverable or admissible, except for information that is required to be reported under a specific law. The costs associated with the use of a mediator are to be borne equally by the parties, unless otherwise agreed to between the parties prior to the commencement of the mediation process. Departments shall notify participants to a grievance that mediation is an available form of alternate dispute resolution. Settlement communications with any of the Board's settlement facilitators, the State Employee Mediation Program and the State Ombuds Office are all considered confidential mediation communications covered by this Board Rule. (10/1/07)

Board Rule 8-12. Both parties shall review any agreement resulting from a mediation conference before signing it. If the department fails to comply with the terms of the agreement, a grievance may be filed. If the employee fails to comply with the terms of the agreement, such action may be subject to performance evaluation, corrective or disciplinary action.

Settlement

- Board Rule 8-13. Subsequent to filing an appeal or petition for hearing under this chapter, any party may ask the Board staff to facilitate the settlement process and the Board will provide a facilitator, which may be an administrative law judge not assigned as the hearing judge for the matter. However, the parties must attempt to resolve an appeal before the hearing commences, which may include settlement or other form of alternative dispute resolution. If a party to an appeal makes such a request, the other party(ies) must appear at least once at a conference and attempt in good faith to settle the matter. If a party believes settlement is inappropriate, that party must file a motion stating the specific reasons why settlement is inappropriate. The administrative law judge assigned the case, upon good cause shown, may waive the requirement. An administrative law judge may require a settlement conference.
- Board Rule 8-14. The settlement process is private, confidential, and privileged unless the information disclosed is required to be reported under specific law.
- Board Rule 8-15. Only the parties and their representatives shall participate in settlement proceedings, which shall be closed to any other person.
- Board Rule 8-16. All notes taken by the facilitator shall be kept in a separate file and are not accessible to the administrative law judge assigned the appeal. At the end of the case, the files shall be destroyed. There will be no communication regarding the substance of the settlement negotiations between the facilitator and the administrative law judge hearing the appeal.
- Board Rule 8-17. The facilitator cannot be a witness in any proceeding on the subject matter. Communication between the parties at the settlement conference shall not be admissible at the hearing. However, this does not bar admission of evidence discovered by a party outside the settlement conference.
- Board Rule 8-18. Any settlement agreement reached shall be reviewed by both parties prior to signature. Upon reaching a signed settlement agreement, the parties shall file a signed stipulated motion with the Board seeking dismissal of the case or action, and attach a signed copy of the settlement agreement. The Board's director or an administrative law judge will promptly enter an order pursuant to the stipulated motion.
- Board Rule 8-19. If the employee or the department contends the other party has not complied with the terms of the settlement agreement, the employee or the department may petition the Board for a hearing. If the employee does not comply with the terms of the agreement, the action may be subject to the provisions in the "Performance" chapter.
 - A. If the employee is no longer employed by the department and either party contends the other has not complied with the terms of a settlement agreement, the employee or the department may seek review or enforcement of the Board's order entered pursuant to Board Rule 8-18 above, under the provisions of §24-4-106, C.R.S. (1/1/07)

Arbitration

Board Rule 8-20. Parties may enter into a stipulation for dismissal of the appeal and diversion to arbitration under the Uniform Arbitration Act. The stipulation must include both parties' knowing and voluntary waiver of all appeal rights under the state personnel system. The arbitrator's award

cannot order any action that violates state personnel rules, provisions of constitution or law, or affect the rights of any individual who has not agreed to be a party in the proceeding.

Petition for Declaratory Orders

- Board Rule 8-21. Any person may petition the Board for a declaratory order to clarify the applicability of statute, Board rule or order to the petitioner.
 - A. Any petition must include: petitioner's name and address; whether petitioner is a state personnel system employee; the related statute or Board rule or order; and a concise factual statement of the issues involved. The Board may deny any petition that does not contain all of this information.
 - B. In determining whether to issue a declaratory order, the Board may consider factors including, but not limited to, whether a declaratory order will terminate the uncertainty or controversy giving rise to the petition; whether the petitioner has another remedy or avenue for review of the controversy; whether there is another case or investigation pending before the Board, a court, or another department involving the controversy; and whether the issue is ripe for review.
 - C. The Board may grant the petition for declaratory order and order that the matter be set for hearing, order briefing on the issues presented in the petition, or deny or dismiss the petition. The Board will notify the petitioner of its decision.
 - D. Any action or order of the Board is subject to judicial review.

Investigation Of Retaliation For Disclosure Of Information (Whistleblower Claims)

- Board Rule 8-22. An employee who seeks to have an allegation of retaliation for disclosure of information reviewed by the Board must file a complaint with the Board in accordance with §24-50.5-101, C.R.S., et seq. ("Whistleblower Act").
- Board Rule 8-23. The Board will send a copy of the complaint to the department for an initial response. The response must be filed within 45 days after the date the complaint was filed with the Board. (1/1/07)
- Board Rule 8-24. The Board will notify the employee of the notice requirements of the Governmental Immunity Act, §24-10-101, C.R.S., et seq.

Board Rule 8-25. Repealed. (1/1/07)

Board Rule 8-26. Repealed. (1/1/07)

- Board Rule 8-27. If an appeal is also filed asserting a constitutional or statutory right to a hearing, and the appeal and complaint relate to the same or closely related facts, they may be consolidated for evidentiary hearing. Either party may request, or the administrative law judge may order, consolidation if it would be more efficient and would not unduly prejudice any party. The hearing shall be set to commence not later than ninety days after the receipt of the written response filed by the agency and may be continued once for thirty days only upon good cause shown and upon approval of the administrative law judge. (1/1/07)
- Board Rule 8-28. If the employee does not have a constitutional or statutory right to a hearing, the case will be set for preliminary review pursuant to the discretionary Board hearing section of these rules. (1/1/07)

Board Rule 8-29. Repealed. (1/1/07)

Allegation Of Discrimination

- Board Rule 8-30. Pursuant to §24-50-125.3, C.R.S., the Board has jurisdiction over claims of discrimination within the state personnel system. If an employee or applicant seeks to have an allegation of discrimination reviewed by the Board, that person must file a petition for hearing within 10 days of the action or receipt of any final written decision (including, but not limited to, grievance decisions, selection decisions, or performance pay system dispute resolution decisions). All such decisions must notify that employee or applicant of the right to appeal the final decision, including the time frame for such an appeal, and the Board's address and telephone and facsimile numbers for filing the appeal. Except for appeals, the Board will defer action to allow the parties a chance to resolve the issue. (1/1/07)
- Board Rule 8-31. Upon receipt of an appeal or a petition for hearing on matters covered by §24-34-402, C.R.S., the Board will refer the matter to the Colorado Civil Rights Division (CCRD) for investigation and issue a notice of referral.
 - A. If the allegation is against the CCRD, the Board shall appoint an independent third party to investigate and will inform CCRD.
 - B. If the applicant or employee wants CCRD to investigate the discrimination claim, the employee must file a discrimination charge with the CCRD within 15 days of receipt of the notice of referral. The employee must file a verification form with the Board no more than 10 days after filing the CCRD charge, with a copy to the respondent.
- Board Rule 8-32. Any time an appointing authority becomes aware of an allegation of discrimination based on disability, the matter must be referred to the department's ADA coordinator for investigation, no later than 7 days from the date of the allegation. This includes grievances and meetings to consider adverse action against the employee. Any time limits are suspended pending the investigation.
- Board Rule 8-33. For claims asserted pursuant to §24-34-402, C.R.S., an employee can waive the right to investigation and proceed to preliminary review or hearing any time prior to completion of the investigation. The date of written notice of waiver of investigation is the date of appeal to begin the 45-day hearing period. If no specific, written charge is filed with the CCRD within 15 days of receipt of the referral order from the Board, or if the employee fails to file a verification form with the Board, the employee is deemed to have waived investigation and the matter will proceed to preliminary review or hearing.
- Board Rule 8-34. If the investigation is not completed within 270 days, absent granting a time extension, the Board will notify the parties and set the matter for preliminary review or hearing.
- Board Rule 8-35. When the investigation is complete, a written opinion of probable cause or no probable cause will be prepared. The Board will mail the opinion to the parties along with notice of their rights.
- Board Rule 8-36. If probable cause is found in the CCRD investigation, CCRD will attempt to conciliate. If conciliation succeeds, the results and any settlement agreement will be sent to the Board. The Board will notify the parties by mail. If attempts fail, CCRD will notify the Board in writing. The Board will notify the parties by mail, including informing them of the right to appeal within 10 days of the Board's notice. If a party appeals the probable cause finding, the issue of discrimination shall be set for hearing.
- Board Rule 8-37. If no probable cause is found in the investigation, CCRD or the independent third-party investigator will send the opinion to the Board who will notify the parties in writing by mail. The employee or applicant may appeal within 10 days of receipt of the opinion. If the

employee fails to file an appeal or petition, the discrimination claim is considered abandoned and dismissed, and the matter will proceed without consideration of the issue of discrimination.

Attorney Fees And Costs

Board Rule 8-38. Pursuant to §24-50-125.5, C.R.S., attorney fees and costs may be assessed against an applicant, employee or department, upon final resolution of a proceeding against a party as follows:

- A. 1. If the personnel action from which the proceeding arose, or the appeal of such action is found to have been instituted frivolously; (A frivolous personnel action or appeal therefrom shall be defined as an action or defense in which it is found that no rational argument based on the evidence or the law is presented.)
 - 2. If the personnel action from which the proceeding arose, or the appeal of such action is found to have been made in bad faith, was malicious, or was used as a means of harassment; (Such a personnel action or appeal therefrom shall be defined as an action or defense in which it is found that the personnel action was pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth.)
 - 3. If the personnel action from which the proceeding arose is found to have been groundless. (A groundless personnel action or appeal therefrom shall be defined as an action or defense in which it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense.)
- B. 1. A party seeking an award of attorney fees and costs must provide notice to the Board and all parties, prior to final resolution of proceeding, of the intent to seek an award of attorney fees and costs.
 - 2. If a party requests an award of attorney fees and costs, each party shall be given an opportunity to present evidence on the issue.
 - 3. The party seeking an award of attorney fees and costs shall bear the burden of proof with regard to whether or not a personnel action or appeal therefrom is frivolous, in bad faith, malicious, harassing, or otherwise groundless.

Board Rule 8-39. Attorney fees may be assessed against an applicant, employee, department, or their respective counsel, for abuses of discovery procedures, prehearing procedures, or other proceedings before the Board or its administrative law judges as provided in the Colorado Rules of Civil Procedure.

- A. Any party seeking attorney fees under this rule shall file and serve a written motion for such fees no later than the conclusion of a proceeding, or make an oral motion for such fees during the course of a proceeding.
- B. Any response to a motion for attorney fees shall be filed within ten (10) days of the date of filing or making of the motion.
- C. A person or party that may be affected by a motion for attorney fees may request a hearing. The administrative law judge may hold a hearing if it is determined, in his or her discretion, that a hearing would materially assist in ruling of the motion.

Board Appeal Process

Address

Board Rule 8-40. Appeals asserting claims or grounds within the Board's jurisdiction as authorized by Colorado Constitution, statute, or these rules must be submitted to the Board at:

Colorado State Personnel Board Attn: Appeals Processing 633 17th Street, Suite 1320 Denver, CO 80202

Filing Deadlines

- Board Rule 8-41. Any appeal is timely if it is received by the Board or postmarked within 10 days after receipt of the written notice of the action. Any appeal that is not timely will be denied except for the following.
 - A. If the 10th day falls on a weekend or legal state holiday (regular schedule), the time period will be extended to the next regular business day.
 - B. The Board may extend the period of time for good cause as long as the request for extension is received by the Board or postmarked within the 10-day appeal period. The Board shall add up to three days to the date of notice if it was not sent by certified mail, hand delivered, or filed by facsimile transmission; however, the 10-day period begins to run from the actual date of receipt.

Scope and Contents of Board Appeals

- Board Rule 8-42. Claims (with no allegation of discrimination) based upon the selection and examination process, downward allocation of a position, disputes involving the performance pay system, matters involving the overall administration of the personnel system by a department, not otherwise subject to an appeal to the Board, and matters involving overtime, FMLA, removal of a name from an eligibility list, or rejection of an application shall be filed with the Director pursuant to the provisions of these rules governing "Director's Dispute Resolution Processes" in this chapter.
- Board Rule 8-43. The appeal must be in writing and copies provided concurrently to the affected department. Use of the standard "Colorado State Personnel Board Consolidated Appeal/Dispute Form" found on the Board website is required. For good cause shown, the Board may waive this requirement provided the person filing the appeal ("complainant") sets forth such grounds at the time the appeal is submitted. The appeal must clearly state the following in sufficient detail. (1/1/07)
 - 1. The name, address, and telephone number of the complainant and any representative.
 - 2. The specific action being appealed and a copy of the written notice.
 - 3. The date the complainant received the notice of action.
 - 4. A short, specific statement giving the reason for the appeal.
 - 5. Whether the complainant is a certified employee.
 - 6. The specific remedy sought.

Failure to provide a copy to the affected department may be grounds for denial or dismissal of the appeal.

- Board Rule 8-44. If the notice of appeal does not contain sufficient or appropriate grounds for filing an appeal, the Board may dismiss the appeal with prejudice. Employees are required to keep the Board informed of their current address and telephone number, and to attend any required meetings or hearings. If either party does not follow these procedures, the Board may take appropriate action, including dismissal with prejudice.
- Board Rule 8-45. The determination of timeliness of any subsequent documents will be the date of receipt in the Board's office. Whenever a person or party files any documents with the Board, copies must be provided to the opposing party at the same time.

Discretionary Board Hearings

- Board Rule 8-46. The Board may use its discretion to grant a hearing for actions that do not adversely affect a certified employee's current base pay, status, or tenure, and where the employee does not have a right to a hearing, appeal, or review by law or rule.
 - A. The Board may grant a hearing in matters such as a violation of federal or state constitutional rights, an adverse written decision from the highest level of a department's grievance process, a decision from the "Director's review process" involving the overall administration of the state personnel system (referred to later in this chapter), unlawful discrimination where there is no mandatory right to a hearing, including discrimination in the selection and examination process, and reversion of a trial service employee for unsatisfactory performance.
 - B. The Board cannot grant a hearing to probationary employees who appeal discipline for unsatisfactory performance unless the employee alleges unlawful discrimination or other statutory or constitutional violation.
- Board Rule 8-47. The written petition for hearing must be filed within 10 calendar days after a complainant receives written notice of the action on which the petition is based, and must include a copy of the action. In the case of an opinion of no probable cause to credit allegations of discrimination or reasonable basis to find a violation of the State Employee Protection Act (whistleblower), the written opinion is the notice of the action. Contents of the petition must be the same as those required in an appeal as listed in the scope and contents of Board appeals section of this chapter.
 - A. Failure to provide a copy of the petition to the respondent at the same time it is filed with the Board may be grounds to deny the petition for a hearing.
- Board Rule 8-48. Within 15 days of the receipt of notice of the filing of a petition for hearing, the parties shall provide to each other copies of all documents or information relied upon by that party in reaching, in the complainant's case, the decision to grieve the respondent's action(s) and to appeal the respondent's final agency decision, and, in the respondent's case, the final agency decision that constitutes the subject of the petition for hearing. If either party asserts a privilege regarding such documents or information, it shall specify the nature of the privilege and provide the other party a privilege log that describes each document by title, author, date, subject matter, and legal basis for preserving the privileged or confidential nature of the documents or information withheld. (10/1/07)
- Board Rule 8-49. The action that is the subject of the petition for hearing will not be reversed or modified unless it is found to be arbitrary, capricious, contrary to rule or law, or in violation of the grounds set forth in section §24-50-123, C.R.S.
- Board Rule 8-50. Each party is required to file an information sheet containing the following specifically and clearly stated information:

A. Complainant

- 1. the facts complainant is prepared to prove, if a hearing is granted, that the respondent's actions were arbitrary, capricious, or contrary to rule or law;
- any legal argument or authority complainant relies upon to support his or her claims;

- 3. the names, addresses, and telephone numbers of all witnesses, and a brief description of the testimony of each such witness that would substantiate complainant's allegations and claims;
- 4. a list of exhibits that would substantiate complainant's allegations and claims, with copies of such exhibits attached to the information sheet; and
- 5. a description of the remedy or relief sought by complainant.

B. Respondent

- 1. the response to the allegations and claims of complainant, including all facts respondent intends to prove if a hearing is granted that respondent's actions were not arbitrary, capricious, or contrary to rule or law;
- 2. any legal arguments or authority relied on by respondent;
- 3. the names, addresses, and telephone numbers of all witnesses, and a brief description of testimony of each such witness that would substantiate respondent's allegation and claims;
- 4. a list of exhibits that would substantiate respondent's allegations and claims, with copies of such exhibits attached to the information sheet; and
- 5. the respondent's response to the remedy or relief sought by complainant.
- C. Unless an investigation has been referred and is pending as provided in the allegation of discrimination section of this chapter, complainant shall file his or her information sheet with the Board and serve a copy on the respondent within 25 days of receipt of the petition for hearing by the Board. The respondent shall file its information sheet with the Board no more than ten days after the complainant has filed his or her information sheet with the Board. The complainant may file a reply to the respondent's information sheet within five days. Three days shall not be added for pleadings sent by mail. The Board may grant one extension of time to each party for the filing of information sheets. Such extension shall be for no more than five (5) days, and granted only upon good cause shown. (8/14/10)
- D. In the event an investigation has been referred and is pending pursuant to the allegation of discrimination section of this chapter, the time periods to file information sheets as provided in this rule shall not commence until the final written report or opinion resulting from such investigation is served upon the parties by the Board. (1/1/07)
- E. The parties shall be required to file their respective information sheets with the Board electronically either on disk or CD-ROM, and to also submit a paper copy of the information sheet, with attached exhibits. The Board, for good cause, may waive the requirement of an electronically-filed information sheet if the party, no later than five days prior to the time the information sheet is due, makes a written request to the Board with detailed grounds to support the request.
- F. If complainant fails to file a conforming information sheet, the petition for hearing may be considered abandoned and dismissed. If the respondent fails to file an information sheet, the preliminary recommendation will be based solely upon the information submitted by complainant.
- G. The Board's director or administrative law judge will review the information presented by the parties in their information sheets to determine whether valid issues exist which merit a hearing. Complainant has the burden of demonstrating the existence of valid issues which merit a hearing by showing that there is an evidentiary and legal basis that would

- support a finding that the action was arbitrary, capricious, or contrary to rule or law, and that the relief requested by complainant is within the Board's statutory authority.
- H. An administrative law judge or the Board's director will make a written preliminary recommendation to the Board, with copies provided to both parties, as to whether a hearing should be granted or denied.
- At any stage in the preliminary review process, the Board's director or administrative law judge may request the parties to participate in a mediation conference with a trained mediator.
- Board Rule 8-51. The Board will consider the preliminary recommendation and render its decision to grant or deny a hearing pursuant to §24-50-123(3), C.R.S.
 - A. The Board will not consider any document or other information submitted by either party after issuance of the preliminary recommendation. If the Board denies the petition for hearing, its determination shall not be subject to reconsideration.
 - B. If the Board grants a hearing, the date of the order will be treated as the date the appeal was submitted for purposes of determining the deadline for commencing a hearing. If the hearing is denied, the date of the order shall be used for purposes of any further appeal.
- Board Rule 8-52. If an employee files a petition for hearing and an appeal asserting a constitutional or statutory right to a hearing and the mandatory and discretionary appeals relate to the same or closely related matters, the administrative law judge or Board's director may consolidate the cases if it is determined that consolidation would be more efficient and would not unduly prejudice any party.

Board Appeals

- Board Rule 8-53. Any action that adversely affects a certified employee's current base pay, status, or tenure as defined by Board rule may be appealed and will be set for hearing. An adverse effect results in a reduction of current base pay or loss of other rights to which an employee is entitled by law, including denial of reemployment rights or removal from a reemployment list, probable cause opinion in discrimination cases, appeals of investigative reports finding reasonable basis for retaliation for disclosure of information, dismissal for failure to perform satisfactorily under senior executive service contracts, and reductions of salary during the term of senior executive service contracts. Issues involving annual total compensation survey, discretionary pay differentials, the granting of in-range salary movements, leave sharing, personal services contracts, job evaluation system and actions, renewals of senior executive service contracts at a reduced salary, and removal of positions from the senior executive service pay plan into the traditional classified pay plan are not subject to appeal.
 - A. Disciplinary actions are subject to appeal and will be set for hearing, except discipline of probationary employees for unsatisfactory performance, reversion of trial service employees for unsatisfactory performance, and demotion of conditional employees to the class in which last certified. An employee who resigns in lieu of disciplinary action forfeits appeal rights.
 - B. Employees who are separated for failure to perform under senior executive service contracts do not have a right to progressive discipline or to a Board Rule 6-10 meeting. In such an appeal, the appointing authority must produce evidence that the employee's performance was not satisfactory. The employee shall then have the burden of producing evidence that performance was satisfactory, and shall bear the burden of proof

that the appointing authority's decision was arbitrary, capricious, or contrary to rule or law. (1/1/07)

Practice Before The Board And Preparation For Board Hearings

Board Rule 8-54. The Colorado Rules of Civil Procedure and Evidence apply to proceedings before the Board as follows:

- A. To the extent practicable, unless inconsistent with these rules, the Colorado Rules of Civil Procedure (C.R.C.P.) apply to matters before the Board. Unless the context otherwise requires, whenever the word "court" appears in the C.R.C.P., that word shall be construed to mean the Board or an administrative law judge for the Board.
- B. To the extent practicable, the Colorado Rules of Evidence (C.R.E.) applicable to civil cases apply to all hearings before the Board or its administrative law judges. Unless the context otherwise requires, whenever the word "court," "judge," or "jury" appear in the C.R.E., such word shall be construed to mean the Board or an administrative law judge for the Board. An administrative law judge for the Board has the discretion to admit evidence not admissible under C.R.E., as permitted by law.

Representation

Board Rule 8-55. An individual may appear before the Board on his or her own behalf, or by an attorney authorized to engage in the practice of law in Colorado. Nothing shall preclude an out-of-state attorney from being admitted to practice before the Board in accordance with C.R.C.P. 221.1.

- A. An attorney representing a party before the Board shall file an entry of appearance or sign a pleading. The entry of appearance shall contain the attorney's name, address, telephone and facsimile transmission numbers, attorney registration number, and the identity of the party for whom the appearance is made.
- B. An attorney may withdraw from a case before the Board only upon order of the administrative law judge. Such approval shall be within the sound discretion of the administrative law judge, and shall not be granted until the attorney seeking to withdraw has made reasonable efforts to give actual notice to the client:
 - 1. that the attorney wishes to withdraw;
 - 2. that the Board retains jurisdiction over the case;
 - 3. that the client has the burden of keeping the Board informed where notices, pleadings, and other papers may be served;
 - 4. that the client has the obligation to prepare for hearing or hire other counsel to prepare for hearing;
 - 5. that if the client fails or refuses to meet these burdens, the client may suffer an adverse determination at hearing;
 - 6. of the dates of any proceeding, including hearing, and that holding of such proceedings will not be affected by the withdrawal of counsel:
 - 7. that service of pleadings and papers in the case may be made upon the client at his or her last known address within 10 days of the notice.

The above notice must be in writing and filed with the Board along with a statement showing the manner in which the notice was given to the client, and setting forth the client's last known address and telephone number.

C. The client and opposing attorney shall have 10 days from the date of the notice to object to a withdrawal. After the withdrawal is approved by the Board's director or

administrative law judge, the attorney shall notify the client of the effective date of such withdrawal, and all pleadings, notices or other papers may be served on the party directly by mail at the last known address of the party until new counsel enters an appearance.

Board Rule 8-56. The filing and service of pleadings and other papers, including facsimile filings shall be governed by the following.

- A. The original of an appeal, petition, pleading, or other papers shall be filed with the Board. After the Board has assigned a case number to a matter, all pleadings and other papers filed with the Board shall contain the assigned case number.
- B. The facsimile capabilities of the Board are limited. Parties are encouraged to avoid filing pleadings or other papers with the Board by facsimile copy, except when reasonably required by time constraints. Facsimile copies may be filed with the Board in lieu of the original document, provided, however, that if a complete facsimile copy fails to conform to Board rules, it will not be accepted for filing. The party or attorney filing the facsimile copy shall keep the original document for production to the Board, if requested.
- C. Documents in excess of six pages, excluding the caption or cover sheet, may not be filed in lieu of the original unless otherwise ordered by the Board's director or an administrative law judge.
- D. Any facsimile copy filed or transmitted directly to the Board shall be accompanied by a caption/cover sheet that contains:
 - 1. the title of the document being transmitted and identifying it as a facsimile copy;
 - 2. the case number:
 - 3. the number of pages;
 - 4. identity of the transmitter; and
 - 5. telephone number of the transmitter, along with any instructions.
- E. All facsimile copies filed in lieu of the original document must be filed during normal business hours of the Board between 8:00 a.m. and 5:00 p.m., Monday through Friday, excluding state holidays. In the event a facsimile copy is received outside of normal business hours, it will be considered to have been filed on the next business day.
- F. Service of pleadings or other papers on a party or on an attorney representing a party may be made by hand delivery, facsimile transmission to the facsimile number provided by the party or attorney, by mail to the address contained in the pleadings, or to the party's last known address. When an attorney represents a party, service shall be made on the attorney.

Board Rule 8-57. The filing of motions shall be governed by the following.

- A. Prior to the filing of a motion, the party or counsel filing a motion should confer with the opposing party or counsel. The motion shall, at the beginning, contain a certification that the party filing the motion in good faith has conferred with the opposing party or counsel about the motion. If no conference has occurred, the reason why shall be stated. If the relief sought in the motion has been agreed to by the parties or will not be opposed, the motion shall so state.
- B. Except for motions made during hearing or where the administrative law judge deems an oral motion appropriate, motions should be filed as early as possible prior to hearing, and in no event later than 10 days prior to hearing. Substantive motions shall be supported by a recitation of legal authority either incorporated in the motion or set forth in a separate brief. The responding party shall have 10 days from the date of the motion to file a

response. If there are less than 10 days before the hearing, the responding party may provide a written or oral response at the hearing. No reply from the moving party shall be permitted unless ordered by the administrative law judge. Motions and briefs in excess of 10 pages in length are discouraged.

- C. Motions shall be determined promptly upon the written motion and briefs filed. However, the administrative law judge may order expedited responses, oral argument or an evidentiary hearing on the administrative law judge's own motion or, at the discretion of the administrative law judge on request of a party. The party filing a motion requiring immediate disposition shall call it to the attention of the administrative law judge or Board's director.
- D. A motion shall be deemed a confession upon failure of a party to file a response. If any party fails to appear at oral argument or hearing, without a prior showing of good cause for non-appearance, the administrative law judge or Board's director may proceed to hear and rule on the motion.
- E. Motions for extensions of time or continuance of hearings shall be determined in accordance with this rule. A hearing may only be continued once and only for good cause; motions for extensions of time shall also be granted only for good cause. Stipulations for extensions of time or continuances shall not be effective unless and until approved by an administrative law judge or Board's director.

Prehearing Procedures

Discovery

Board Rule 8-58. Discovery in proceedings before the Board shall be governed by the following.

- A. To the extent practicable, C.R.C.P. 26 through 37 apply to proceedings before the Board and its administrative law judges, except to the extent they provide for or relate to disclosures, numerical limitations on discovery requests, or the time discovery can be initiated.
- B. Preparation for hearing may be done through informal information requests or the formal discovery procedures. No specific order by an administrative law judge is needed for a party to conduct discovery. Without an order, the following applies to preparation for all hearings; however, upon the filing of a proper motion and a showing of good cause, an administrative law judge may modify or waive the following provisions in a specific case.
 - Within 15 days of the receipt of a notice of appeal or the grant of a hearing, the parties, without awaiting a discovery request, are to disclose to each other a listing, together with a copy of all documents, information, data compilations and tangible things in the possession, custody, or control of the party that are relevant to the facts, claims and defenses in the appeal before the Board. Each party shall also make available for inspection and copying the documents or other evidentiary materials not privileged or protected from disclosure. If a party claims a privilege relative to any document or evidentiary materials, that party shall provide the other parties a privilege log describing the title, author, date, and subject matter of the document or material, along with the legal basis for preserving the privileged or confidential nature of the document or materials withheld.
 - 2. All requests for information, either informal or formal, other than depositions, must be served no later than 15 days from the date of issuance of the notice of hearing. The deadlines are not extended if the hearing is continued unless the administrative law judge orders an extension.

- 3. Responses to all requests for information, either informal or formal, must be provided within 20 days after receipt of the request.
- 4. All exchanges of information, including depositions, must be completed at least 10 days prior to the hearing.
- 5. Each party is allowed to take three depositions. Each party is allowed to submit 30 Interrogatories consisting of one question each, 20 requests for Production of Documents consisting of one request each, and 20 Requests for Admissions consisting of one admission each.
- 6. A party must make a good faith effort to resolve any discovery disputes prior to filing a motion to compel discovery. Failure to make such an effort may result in the imposition of sanctions against the moving party. Any motion concerning discovery disputes must certify compliance with this rule.

Prehearing Statements

Board Rule 8-59. The parties shall file with the Board and serve on each other party, no less than 15 days prior to the commencement of a hearing, a prehearing statement setting forth the following:

- A. Statement of claims and defenses (a plain, concise statement of all claims or defenses asserted by the party filing the prehearing statement. Complainants should include the action being appealed and date of the action, the date complainant was notified of the action, complainant's job position and time in the position at the time of the action (including date complainant was certified in the position), complainant's current position, and the remedy/relief requested);
- B. Undisputed facts (a plain, concise statement of all facts which the party filing the prehearing statement contends are or should be undisputed):
- C. Disputed issues of fact (a plain, concise statement of the facts which the party filing the prehearing statement claims are in dispute);
- D. Pending motions (a listing of all outstanding motions that have not been ruled upon by the administrative law judge);
- E. Points of law (a plain, concise statement of all points of law that are to be relied upon or that may be in controversy, citing pertinent statutes, regulations, rules, cases, and other authority);
- F. Witnesses (the name, address and telephone number of any witness whom the party may call at hearing, together with a description of the content of such person's testimony);
- G. Experts (the name, address, telephone number and a brief summary of the qualifications of any expert witness a party may call at hearing, together with a detailed statement as to the opinions or conclusions to which the expert is expected to testify. These requirements may be satisfied by the party incorporating a resume for each expert and a report containing the opinions or conclusions of each expert, along with the basis of each opinion or conclusion);
- H. Exhibits (a description of any physical or documentary evidence to be offered at the hearing. Complainant's exhibits should be marked using letters, and respondent's exhibits marked using numbers. Exhibits should not be attached to the prehearing statement filed with the Board.) (6/1/06); and,

- I. Stipulations (a listing of all stipulations of fact or law, or admissibility of exhibits reached between the parties, as well as any additional stipulations offered to facilitate disposition of the case).
- Board Rule 8-60. Compliance with the prehearing procedures set forth in these rules is mandatory unless modified by order by the administrative law judge on his or her own motion, or motion by one of the parties. Such order may require the parties to participate in a prehearing conference before the administrative law judge.
- Board Rule 8-61. The hearing must commence no later than 90 days after receipt of the appeal.

 All prehearing matters, including the filing of prehearing or amended prehearing statements and completion of discovery, must be concluded prior to commencement of the hearing.
 - A. The commencement will be in person, or if ordered by the administrative law judge prior to the commencement, upon good cause shown, may be by telephone or videoconference where appropriate. Presentation of an opening statement, factual stipulations, and stipulated exhibits will be sufficient to constitute the commencement of the hearing.
- Board Rule 8-62. Both parties must attempt to resolve an appeal before the hearing. This may include settlement.

Responsible/Lead Counsel

Board Rule 8-63. If all parties are represented by counsel in proceedings before the Board, each counsel of record shall be jointly responsible for scheduling conferences and preparing and filing prehearing pleadings and documents as may be required. In the event a party is not represented and will be participating in the hearing, counsel for the represented party in the proceeding shall be responsible for coordinating with the unrepresented party for the purpose of scheduling conferences, obtaining hearing dates, and preparing and submitting prehearing pleadings and documents.

Subpoenas

- Board Rule 8-64. Upon oral or written request of a party or counsel for a party no later than 10 days prior to a hearing or deposition, the Board's director or administrative law judge shall issue a subpoena or subpoena duces tecum requiring the attendance of a witness or the production of documentary evidence, or both, at such deposition or hearing.
 - A. The subpoena or subpoena duces tecum shall be served on the witness to whom it is directed in the same manner as subpoenas served in proceeding in the district courts for the State of Colorado pursuant to C.R.C.P. 45. In addition, the subpoena or subpoena duces tecum must be served at least 48 hours prior to the commencement of the deposition or hearing.
 - B. Except for witnesses subpoenaed on behalf of the State of Colorado, or an officer or department of the State of Colorado, witnesses subpoenaed pursuant to this rule shall be paid the same fees for attendance and mileage as are paid to witnesses in the district courts of the State of Colorado. The party requesting that the subpoena be issued shall pay such fees to the witness at the time the subpoena is served as required by this rule.
 - C. Upon the failure of a party or counsel to comply with the requirements of either subparagraphs A or B of this rule, the party or witness subject to the subpoena may petition the Board's director or the administrative law judge for an order quashing such

- subpoena. The Board's director or the administrative law judge, in his or her discretion, may also award attorney fees for such non-compliance pursuant to Board Rule 8-39. (1/1/07)
- D. Upon failure or refusal of any witness to comply with a subpoena issued and served upon them under this rule, the Board's director or administrative law judge may petition the district court for the City and County of Denver for an order citing such witness in contempt for such failure or refusal. The procedure for such contempt proceedings shall be governed pursuant to §24-4-105(5), C.R.S.

Post-Hearings Proceedings

- Board Rule 8-65. A petition for reconsideration of the initial decision may be filed by an original party within five days of receipt of the initial decision. The administrative law judge may reconsider an initial decision without the petition within 10 days of issuance. Petitions shall be limited to matters alleged to be overlooked or misunderstood by the administrative law judge and cannot contain other arguments. Oral arguments shall not be permitted on any petition. A determination on the petition is typically issued but if no order is issued, the petition is considered denied. Filing a petition does not extend the time for filing an appeal of the initial decision.
- Board Rule 8-66. Tape recordings of a hearing shall be erased 60 days after expiration of all rights resulting from that hearing.

Board Review Of Initial Decisions and Dismissal Orders

- Board Rule 8-67. Appeals of dismissal orders and initial decisions of the administrative law judge are made in accordance with statute. Appeals should be filed with the Board and a copy served on the opposing party, within 30 days of mailing of the order or decision. Any party who seeks review of all or part of the dismissal order or initial decision must file an appeal within 30 days, with no extensions for cross-appeals. Timely filing is determined by the date the Board actually receives the appeal. Failure to serve a copy on the opposing party may result in dismissal. The Board is required by statute to certify the record within 60 days after the date the record is designated. The Board will review and render a written decision within 90 days of the date the record is certified.
- Board Rule 8-68. Any party who seeks to reverse or modify the initial decision must file with the Board a designation of record within 20 days following the date of issuance of the initial decision. A copy of this designation shall be served on all parties. Within 10 days, any other party or the Board may also file a designation of additional parts of the transcript of the proceedings which is to be included. Any appeal of the initial decision must be filed within 30 days of the date of the decision. Any appealing party shall submit appropriate payment for preparation of the record at the time the appeal is filed.
- Board Rule 8-69. Any party who designates a transcript as part of the record is responsible for obtaining and paying a certified court reporter who shall prepare the transcript and file it with the Board no more than 59 days after the designation of record. Failure to designate a transcript is deemed a waiver of a request to prepare the transcript. If no transcript has been filed within the time limit, the record will be certified and the transcript will not be included in the record or considered on appeal. In absence of a transcript, the Board is bound by the findings of fact of the administrative law judge.
- Board Rule 8-70. The appeal of the initial decision shall describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that are alleged to be improper, and the remedy being sought.

- Board Rule 8-71. Upon certification of the record of administrative proceedings, the parties shall be notified in writing of the date the Board will consider the appeal. The Board is required by statute to decide the appeal no more than 90 days after the certification of the record.
- Board Rule 8-72. Absent specific orders to the contrary, the appellant shall serve and file the brief within 20 days after the Board certifies the record. The opposing party's brief shall be filed within 10 days after receipt of the appellant's brief. The appellant may file a reply brief within five days. Three days shall not be added for pleadings sent by mail.
 - A. The final brief must be filed no later than 12 days before the Board meeting where the appeal will be considered. No extensions of time will be granted unless they allow both parties to file briefs within that time limit.
 - B. In cases where both parties have filed an appeal, they will be ordered to file simultaneous briefs as described above unless the parties file a stipulated amended briefing schedule.
- Board Rule 8-73. All briefs must be typewritten and the text double-spaced, using only 8 ½ x 11-inch paper. Except by permission of the Board's director, briefs shall not exceed 10 pages, exclusive of pages containing the table of contents, tables of citations, and any addendum containing statutes, rules, regulations, and the like. An original and nine copies must be filed with the Board and a copy must also be served on the opposition. (6/1/06)
- Board Rule 8-74. For any appeal to the Board, an original and nine copies of any motion (except extension of time) must be filed. For extensions of time or motions to dismiss based upon settlement of the appeal, the original and one copy must be filed with the Board. The Board director may grant motions for extension of time or motions to dismiss based upon settlement. A copy of any motion must be served on the opposition. (6/1/06)
- Board Rule 8-75. In general, no oral argument will be heard and parties need not be present before the Board. Oral arguments may be allowed at the discretion of the Board. A request for oral argument shall be filed no later than the date the requesting party's brief is due. If granted, oral argument shall not exceed 15 minutes for each party. A request for additional time may be made by motion within 10 days after the briefs are closed but granted only for good cause. If oral argument is granted, parties are given reasonable notice of the time and place. The Board may terminate the argument whenever, in its judgment, further argument is unnecessary.
- Board Rule 8-76. Any party appealing a final Board order shall serve a copy of the notice of appeal on the Board at the time of filing the notice.

Security

Board Rule 8-77. Security during Board meetings and Board hearings may be obtained by any party at that party's expense. Board staff will assist the parties in obtaining security when possible.

Director's Dispute Resolution Processes

General

8-78. Disputes asserting claims or grounds within the Director's jurisdiction as authorized by Colorado Constitution, statute, or these rules must be submitted to the Director at: (5/1/10)

Colorado State Personnel Board Attn: Appeals Processing 633 17TH Street, Suite 1320 Denver, CO 80202

- 8-79. Disputes must be in writing and copies provided concurrently to the affected department. Use of the standard "Colorado State Personnel System Consolidated Appeal/Dispute Form" found on the Director's web site is required. For good cause shown, the Director may waive this requirement provided the person filing the appeal ("complainant") sets forth such grounds at the time the appeal is submitted. The dispute must clearly state the following in sufficient detail. (7/1/07)
 - 1. The name, address, and telephone number of complainant and any representative.
 - 2. The specific action being disputed and a copy of the written notice.
 - 3. The date complainant received the notice of action.
 - 4. A short, specific statement giving the reason for the dispute.
 - 5. Whether complainant is a certified employee.
 - 6. The specific remedy sought.
- 8-80. Copies of the written dispute must be provided concurrently to the affected department. Failure to do so may result in denial or dismissal of the dispute.

Director's Appeals

- 8-81. An applicant or employee who is directly affected may appeal to the Director for the following.
 - A. An allocation of an individual position to a lower pay grade. The written appeal must be filed within 10 days of receipt of notice. Employees do not have the right to appeal movement of positions into or out of the senior executive service.
 - B. Objection to the content or conduct of an examination. A written appeal must be filed within 10 days from the date of administration of an examination component.
 - Conduct refers to all activities, processes, or functions that are completed from the time the qualified applicant pool is identified to the creation of the ranked eligible list.
 - 2. Content refers to the subject matter of the examination. Scores and ranks are outcomes of a process and are not considered as conduct or content of an examination.

The appeal is timely filed if it is received by 5:00 p.m. or postmarked by the 10th day. It may be filed by mail, hand delivery, or facsimile to the Director.

- 8-82. Any applicant or employee may make direct inquiry to the department or individual involved in matters covered by these procedures to try and achieve informal resolution. However, such discussions do not extend the appeal time limit.
- 8-83. The Director will promptly acknowledge receipt of the appeal in writing and include instructions and a timetable. The Director will retain jurisdiction over appeals but may appoint an advisory panel or person. All parties must adhere to the Director's timetable.

- 8-84. Advisors shall be human resource professionals in job evaluation or selection depending on the action appealed.
- 8-85. The appellant shall file a written position statement with the Director, with copies to the respondent department. Any information relevant to the appeal must be available, subject to statute, to the appellant for inspection prior to the appellant's filing date for a position statement. The appellant must pay the reasonable cost of any copying.
- 8-86. Upon receipt of the appellants' position statement, the responding department shall file a position statement with the Director.
- 8-87. Position statements filed by the appellant or respondent must be typewritten and the text double-spaced, using only 8½ x 11-inch paper and shall not exceed five pages. Written sworn statements or documents that support the party's position may be attached.
- 8-88. Any materials that are not filed on time will be excluded from consideration of the merits of the appeal. Failure to provide a copy of all materials to the affected department may be grounds for denial or dismissal of the appeal.
- 8-89. Confidentiality of Examination Materials. Examination data and documents will be filed in a sealed envelope with the Director only. Such documents include, but are not limited to: test questions, scoring keys and scores or results. A list of documents sent under sealed envelope will be given to all appellants.
 - A. Use or disclosure of the information outside the appeal review process is strictly prohibited. Confidentiality of material in sealed envelopes shall be maintained throughout all phases of the review process, including preparation of any record for judicial review. The confidential material will be returned to the Director after the completion of a panel review. The Director will return the contents to the responding party if no request for judicial review is filed.
- 8-90. Oral Argument. No party is entitled to oral argument; it is discretionary with the Director or advisor(s). Either party may request oral argument in writing, on or before the date on which the position statement is due. A request must be granted before oral argument is permitted. The Director or advisor(s) may request oral argument on any issue raised regardless of whether any party has requested it.
 - A. The Director or advisor(s) will notify all parties of the date, time, and place. No continuances will be granted. All parties may speak. Each party is allowed 15 minutes. The appellant speaks first, followed by the opposing side. No witnesses or new written material will be allowed. Questions asked by the Director or advisor(s) are outside the 15 minutes allotted to a party.
 - B. Oral argument will be tape recorded unless all parties agree in writing to waive the recording. The tape recording will be destroyed 90 days after the decision is issued if no notice of judicial review is received.
- 8-91. The Director shall issue a written decision no later than 90 days after receipt of the appeal. The action may be overturned only if found to have been arbitrary, capricious, or contrary to rule or law. Failure to issue a decision within the time limit will cause the initial decision to be upheld. The matter appealed must be resolved within the 90 days, after which the Director loses jurisdiction and does not have the authority to extend the time period.
- 8-92. Decisions of the Director are subject to judicial review in accordance with statute.

8-93. An appellant may withdraw an appeal at any time prior to the final decision. If the remedy is granted during the course of the appeal, the appeal will be considered moot and dismissed with prejudice.

Performance Management Disputes

- 8-94. The performance management dispute resolution process is an open, impartial process that is not a grievance or appeal. No party has an absolute right to legal representation, but may have an advisor present. The parties are expected to represent and speak for themselves. (7/1/07)
- 8-95. Only the following matters are disputable:
 - A. the individual performance plan, including lack of a plan during the planning cycle;
 - B. the individual final overall performance evaluation, including lack of a final overall evaluation; and, (8/1/08)
 - C. the application of a department's performance management program to the individual employee's plan and/or final overall evaluation. (8/1/08)
- 8-96. The following matters are not disputable:
 - A. the content of a department's performance management program; (7/1/07)
 - B. matters related to the funds appropriated; and, (8/1/08)
 - C. the performance evaluations and merit pay of other employees. (9/1/12)
- 8-97. Every effort shall be made by the parties to resolve the issue at the lowest possible level in a timely manner. Informal resolution before initiating the dispute resolution process is strongly encouraged.
- 8-98. <u>Dispute Resolution Process.</u> Only the issue(s) as originally presented in writing shall be considered throughout the dispute resolution process.
 - A. Internal Stage. The first stage is the department internal dispute resolution process. Each department shall continually communicate and administer a detailed internal dispute resolution process that complies with the requirements of, and is approved in advance by, the Director. A description of the process must be communicated to all employees and must include the following elements.
 - 1. The time limits and the process for filing a written request for review of the issue(s) throughout the dispute resolution process.
 - Who will decide the issue(s). The appointing authority is the decision maker unless it is delegated in writing and publicized in advance. Employees must be notified of the authorized decision maker for their disputes.
 - 3. The time limits for issuing the final written department decision.
 - 4. Any other specific requirements established by the Director.

A department's decision on issues involving an individual performance plan or evaluation concludes at the internal stage and no further recourse is available. For issues disputable at the external stage, the employee shall be given written notice, including deadlines and address for filing and the requirement to include a copy of the original written dispute and the department's final decision.

- B. External Stage. This stage is administered by the Director. Only those original issues involving the application of the department's performance management program to the individual performance plan or evaluation. (7/1/07)
 - 1. Within five working days from the date of the department's final decision, an employee may file a written request for review with the Director at the address specified in the Director's dispute resolution processes section of this chapter.
 - 2. The request for external review shall include a copy of the original issue(s) submitted in writing and the department's final decision.
 - a. The Director or designee shall retain jurisdiction but may select a qualified neutral third party to review the matter. The Director or designee shall issue a written decision that is final and binding within 30 days.
- C. In the event that an employee with a pending dispute separates from the state personnel system, the dispute is dismissed. (8/1/08)
- 8-99. The scope of authority of those individuals making final decisions throughout the dispute resolution process is limited to reviewing the facts surrounding the current action, within the limits of the department's performance management program. These individuals shall not substitute their judgment for that of the rater, reviewer, or the department's dispute resolution decision maker if an issue is being considered at the external stage. Further, these individuals shall not render a decision that would alter a department's performance management program. (7/1/07)
 - A. In reaching a final decision, these individuals have the authority to instruct a rater(s) to:
 - 1. follow a department's performance management program;
 - 2. correct an error; or,
 - 3. reconsider an individual performance plan or final overall evaluation.
 - B. These individuals may also suggest other appropriate processes such as mediation.
- 8-100. Retaliation against any person involved in the dispute resolution process is prohibited.

Director's Review Process

- 8-101. An applicant or employee may attempt to informally resolve a disagreement for matters that are not otherwise covered in this chapter by contacting the department within 5 days of receipt of the notice or knowledge of the action, e.g., removal of name from an eligible list, rejection of an application, violation of FLSA or FMLA.
- 8-102. A request for review may be filed with the Director within 10 days after receipt of notice or knowledge of the action. It must be in writing to the Director and include the following: job title, department involved, name of the department representative spoken to during informal resolution attempts, the date of the conversation, the specific issue, and the reason it is believed the decision is arbitrary, capricious, or contrary to rule or law.
 - A. A request may also be filed for a Director's review of a general matter that affects the overall administration of the state personnel system that is not otherwise covered by this chapter (except annual compensation survey, the granting of in-range salary movements, discretionary pay differentials, leave sharing, granting and application of discretionary saved pay during exercise of retention rights, and job evaluation system and actions). A Director's decision in this type of review is subject only to a discretionary Board hearing. (2/1/07)

- 8-103. The Director will select an investigator to review the matter.
- 8-104. The investigator's written report of findings or Director's decision will be issued within 90 days from receipt of the written request. The decision may be overturned only if found to be arbitrary, capricious, or contrary to rule or law. Both parties will receive a copy of the decision. If a decision is not issued within the time period, the initial decision is upheld.